

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1978

NO. **78-1881**

CARPENTERS PENSION TRUST FUND
FOR NORTHERN CALIFORNIA
Appellant,

vs.

CHRISTINE CAMPA, *Appellee*
and

FERNANDO S. CAMPA, *Appellee,*

JOAN CLARE DURKIN, *Appellee*
and

JAMES PATRICK DURKIN, *Appellee,*

CAROLYN J. BRYANT, *Appellee.*

On Appeal From
The Court of Appeal of the State of California,
First Appellate District

JURISDICTIONAL STATEMENT

THOMAS E. STANTON, JR.
221 Sansome Street
San Francisco, California 94104

VICTOR J. VAN BOURG
45 Polk Street
San Francisco, California 94102

Of Counsel:

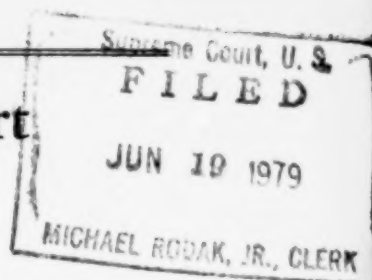
JOHNSON & STANTON

VAN BOURG, ALLEN,

WEINBERGER & ROGER

San Francisco, California

Counsel for Appellant



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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 89 Cal.App.3d 113, and appears in Appendix A to this petition. The minute order of the California Supreme Court denying Petitioner's application for a hearing appears in Appendix B.

**STATEMENT OF THE GROUNDS ON WHICH THE
JURISDICTION OF THIS COURT IS INVOKED**

(i) This is an appeal from a judgment of the Court of Appeal of the State of California, First Appellate District, in three cases involving the California community property law, which is codified in Sections 5105, 5110 and 5125 of the California Civil Code. Appellant Carpenters Pension Trust Fund for Northern California is an employee pension benefit plan covered by the Employee Retirement Income Security Act of 1974, commonly known as ERISA, 29 U.S.C. § 1001 et seq.

In two of the cases, *In re Marriage of Campa* and *In re Marriage of Durkin*, appellant was joined as a party to marital dissolution proceedings pursuant to Section 4363 of the California Civil Code and Rule 1252(a) of the California Rules of Court. In the third case, *Bryant v. Carpenters Pension Trust Fund for Northern California*, appellant was named as a defendant in an action brought by the former spouse of a plan participant against the participant and appellant to secure a declaration that she owned an interest in the participant's prospective pension as a tenant in common and an order directing that the Fund pay such interest to her when the participant retired.

In *Campa* the Court of Appeal reversed a judgment which dismissed appellant from the proceeding and directed entry of a judgment ordering appellant to divide pension benefits, when they accrued, between a participant and his divorced spouse, contrary to the terms of appellant's plan. In *Durkin* and *Bryant* the Court affirmed judgments against

appellant identical to the judgment directed to be entered in *Campa*.

(ii) The judgment of the Court of Appeal was entered on February 2, 1979. A petition for rehearing was filed, based in part upon this Court's decision in *Hisquierdo v. Hisquierdo* (1979) U.S., 99 S.Ct. 802, and a further opinion was entered on March 1, 1979, modifying the initial opinion in one respect and denying a rehearing (App. A, pp. A-26-27). A timely petition for hearing was filed with the California Supreme Court on March 14, 1979, and that Court denied a hearing on April 12, 1979 (App. B). Timely notice of appeal to this Court was filed on June 8, 1979, in the Court of Appeal of the State of California, First Appellate District (App. G).

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) in that the validity of statutes of California were drawn in question on the ground of their being repugnant to the Constitution and laws of the United States, and the decision below was in favor of their validity.

Article 6, Clause 2, of the United States Constitution provides that the Laws of the United States shall be the "supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." Section 514 of ERISA, 29 U.S.C. § 1144, provides that, except as specifically provided in that Section, the provisions of Title I of the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to an employee benefit plan" covered by the Act and defines the term "State law" as including "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State."

The Committee Reports and Congressional debates which preceded enactment of ERISA make clear that Section 514 is a key provision of the Act and that one of the principal purposes of the Section is to protect employee benefit plans covered by the Act from "endless litigation over the validity of State action that might impinge on Federal regulation" (Statement of Senator Jacob Javits quoted in *Hewlett-Packard Co. v. Barnes* (N.D. Cal. 1977) 425 F.Supp. 1294, at p. 1299, aff'd (9th C.A. 1978) 571 F.2d 502, cert. den. 99 S.Ct. 108). Notwithstanding the clear and unequivocal language of the Section, however, appellant has been joined since the effective date of the Act as a party to over 68 marriage dissolution proceedings or post-marriage dissolution proceedings in superior courts located throughout the length and breadth of California.¹ Thus far six of these

¹The title and file number of these proceedings, and the County in which filed, are as follows: *Marriage of Adkins*, Santa Clara County No. 393552; *Marriage of Aranda*, San Francisco City and County No. 709887; *Marriage of Aro*, Alameda County No. H-35262-2; *Marriage of Ascani*, San Mateo County No. 205601; *Bennett v. Bennett and Carpenters Pension Trust Fund for Northern California*, Santa Clara County No. 362421; *Marriage of Bors*, Sacramento County No. 725930; *Marriage of Brandt*, Contra Costa County No. 180043; *Bryant v. Bryant and Carpenters Pension Trust Fund for Northern California*, San Mateo County No. 204325; *Marriage of Bushaw*, Santa Clara County No. 402600; *Marriage of Campa*, Santa Clara County No. 322539; *Marriage of Craig*, Sonoma County No. 97962; *Marriage of Crawford*, Alameda County No. H-56100-2; *Marriage of Damson*, Santa Clara County No. 364760; *Marriage of Day*, Sonoma County No. 98865; *Marriage of Dillard*, Sacramento County No. 731213; *Marriage of Dohse*, Sonoma County No. 97790; *Marriage of Durkin*, Santa Cruz County No. 60586; *Marriage of Edmond*, Alameda County No. 517017-5; *Marriage of Espinoza*, Santa Clara County No. 385858; *Marriage of Esquivel*, Santa Clara County No. 387139; *Marriage of Evans*, Sacramento County No. 732405; *Marriage of Fisk*, Santa Clara County No. 395999; *Marriage of Fragnella*, San Francisco City and County No. 729475; *Marriage of Freese*, San Francisco City and County No. 742273; *Marriage of Fenech*, San Mateo County No. 226297; *Marriage of Goodner*, Alameda County No. H 39831-6; *Marriage of Goulart*, Monterey County No. DR9363;

proceedings have resulted in superior court judgments or orders directing that the Board of Trustees of the Fund take action which would not be in accordance with the documents and instruments governing the pension plan administered by the Board and would therefore violate Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D).

In each of the proceedings that resulted in the judgment from which this appeal is taken, appellant objected by answer and motion to the jurisdiction of the Court over the

Marriage of Greenwood, Humboldt County No. 58304; *Marriage of Hasselberg*, Santa Clara County No. 417947; *Marriage of Holmes*, Alameda County No. H-51306-7; *Marriage of Hoover*, Yolo County No. 36678; *Marriage of Houck*, Shasta County No. 58570; *Marriage of Huizar*, San Francisco City and County No. 735957; *Marriage of Jalo*, Napa County No. 34407; *Marriage of Joncich*, San Mateo County No. 219060; *Marriage of Jones*, Contra Costa County No. 174862; *Marriage of King*, Sacramento County No. 730561; *Marriage of King*, Sonoma County No. 84929; *Marriage of Land*, Contra Costa County No. 189970; *Marriage of Lawrence*, Santa Clara County No. 404584; *Marriage of Levang*, Sacramento County No. 731300; *Marriage of MacKay*, Contra Costa County No. 183931; *Marriage of Manning*, Placer County No. 50005; *Marriage of Matheson*, Sonoma County No. 81661; *Marriage of McClellan*, San Joaquin County No. 133945; *Marriage of McEachern*, Sacramento County No. 737690; *Marriage of Melgoza*, Fresno County No. 228959-3; *Marriage of Michael*, San Mateo County No. 221802; *Marriage of Morris*, Fresno County No. 171219; *Marriage of Morrison*, Alameda County No. H-39856-5; *Marriage of Nimz*, Butte County No. 58400; *Marriage of Palmer*, San Mateo County No. 228894; *Marriage of Perez*, Placer County No. 49663; *Marriage of Preszler*, El Dorado County No. 32363; *Marriage of Rey*, Marin County No. 83529; *Marriage of Reyes*, Merced County No. 53008; *Marriage of Richards*, Sonoma County No. 90791; *Marriage of Saenz*, Santa Clara County No. 393255; *Marriage of Scherer*, Sacramento County No. 742309; *Marriage of Simpson*, Alameda County No. H-25530; *Marriage of Skinner*, San Mateo County No. 204870; *Spence v. Spence and Carpenters Pension Trust Fund for Northern California*, Los Angeles County No. SOC 50958; *Marriage of Stephens*, San Mateo County No. 197027; *Marriage of Stockstill*, San Mateo County No. 215471; *Marriage of Taylor*, Sacramento County No. 738857; *Marriage of Thomas*, Placer County No. 50789; *Marriage of Trefz*, Alameda County No. H-48034-7; *Marriage of Vener*, Santa Cruz County No. 58388; *Marriage of Weissman*, Alameda County No. H-51594-8.

subject matter of the action as against it and claimed that ERISA had preempted the California laws, decisions and rules of court on which the action was based as they related to appellant, and made application to it of such laws, decisions and rules invalid. By its judgment the Court of Appeal overruled this objection and claim, and held that the laws, decisions and rules, as applied to appellant under the facts of each action, were valid. "Under these circumstances, this Court's appellate jurisdiction would seem manifest" (*Japan Line, Ltd. v. County of Los Angeles*, April 30, 1979, 47 L.W. 4477, 4479).

(iv) Other cases believed to sustain the jurisdiction of this Court on appeal are as follows:

Cohen v. California (1971) 403 U.S. 15, 17-18, 91 S.Ct. 1780, 1784;

Warren Trading Post Co. v. Arizona State Tax Commission (1965) 380 U.S. 685, 686, 85 S.Ct. 1242, 1243;

Marcus v. Search Warrants of Property, Etc. (1961) 367 U.S. 717, 721, 81 S.Ct. 1708, 1711;

Reconstruction Finance Corp. v. Beaver County, Pa. (1946) 328 U.S. 204, 206-207, 66 S.Ct. 992, 994;

Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, 288-289, 42 S.Ct. 106, 107-108).

In the event that the Court does not consider appeal the proper mode of review, appellant respectfully requests that the papers whereon this appeal is taken be regarded and acted on as a petition for writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103.

QUESTIONS PRESENTED BY THE APPEAL

1. Do the provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee pension benefit plan covered by that Act?

2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES INVOLVED

The case involves Article Six, Clause 2 of the Constitution of the United States. The United States statutes involved are Sections 3(7) and (8), 206(a), 206(d)(1), 404(a), 409(a), 502, 503, 514, 1021(c), 3021 and 3022(a) of the Employee Retirement Income Security Act of 1974; 29 U.S.C. §§ 1002(7)(8), 1056(a)(d)(1), 1104(a), 1109(a), 1132, 1133, 1144, 1221 and 1222(a). The California statutes involved are Civil Code Sections 4351, 4359, 4363, 4363.1, 4363.2, 4370, 4380, 5105, 5110 and 5125. The California court rules involved are Rules 1252(a), 1253(a), 1255 and 1256. These constitutional and statutory provisions and court rules are printed in Appendix C.

STATEMENT OF THE CASE

Appellant Carpenters Pension Trust Fund for Northern California is an employee pension benefit plan established in August, 1958, by a Trust Agreement which resulted from

collective bargaining between employers engaged in interstate commerce and in an industry affecting such commerce, and employee organizations representing their employees, and is currently maintained by such employers and employee organizations. It receives employer contributions from individual contractors and home builders operating in the 46 Northern California Counties aggregating in excess of \$31,000,000 per year and has approximately 37,000 participants and beneficiaries.

Since 1970 California has provided by law and rule of court that the petitioner or respondent in a marriage dissolution proceeding may obtain the joinder as a party to the proceeding of any person "who has in his possession or control . . . any property subject to the jurisdiction of the court in the proceeding" (California Civil Code, Section 4363; California Rules of Court, Rule 1252(a)). The California courts have held that these provisions authorize the joinder of an employee pension benefit plan as a party to a marriage dissolution proceeding and that they also authorize the entry of an order in the proceeding determining the community property share of the non-employee spouse in the employee's prospective pension and directing that the plan pay such share directly to such spouse upon the retirement of the employee (*In re Marriage of Sommers* (1975) 53 Cal.App.3d 509, 513, 515, 126 Cal.Rptr. 220, 222, 223-4).²

²Subsequent to the institution of the proceedings from which this appeal is taken the law was amended effective January 1, 1978, to provide that no order or judgment in a marital dissolution proceeding "shall be enforceable against an employee pension benefit plan unless the plan has been joined as a party to the proceeding" (California Civil Code, Section 4351) and that such a plan could be joined as a party to a marital dissolution proceeding "only in ac-

From the inception of the appellant Fund in 1958, Section 6 of Article II of the Fund Trust Agreement has prohibited a plan participant from transferring, anticipating, assigning or otherwise disposing of his pension, prospective pension or any other right or interest under the Pension Plan. When the collective bargaining parties revised the Trust Agreement in 1975 to comply with ERISA, they specifically considered the impact of the California community property law as it then existed upon the Fund and its participants and after such consideration, amended Section 6 of Article II by adding the following sentence:

"The rights of a spouse of any Employee or Retired Employee shall be limited to a community property share of the pension actually received by a Retired Employee, after such receipt, and to rights as the des-

cordance with the provisions of Section 4363.1" of the Civil Code (Cal. Stats. 1977, c. 860). Section 4363.1, as added in 1977 and as amended in 1978 (Cal. Stats. 1978, c. 687), provides for the joinder of an employee pension benefit plan as a party by order of the clerk of the Superior court; for the filing of a pleading by the party requesting joinder setting forth her claim and the nature of the relief sought; for the service of summons upon the plan; for the filing by the plan of a notice of appearance without fee; and for the entry of the plan's default if no notice of appearance is filed. Section 4363.2 of the Code, also added in 1977 and amended in 1978, provides that if a notice of appearance is filed, the plan is entitled to notice of any proposed property settlement agreement as it concerns the plan, and it may stipulate to or contest the settlement; the plan need not, but may, appear at any hearing; and if it does not appear at a hearing, the plan must be served with any order which affects the plan or any interest under the plan and it is allowed 30 days after such service within which to move to set aside or modify the provisions of the order affecting it (California Civil Code, Section 4363.2). Section 4363.2 also provides that to the extent not in conflict with that section "and except as otherwise provided by rules adopted by the Judicial Council . . . , all provisions of law applicable to civil actions generally shall apply regardless of nomenclature to the portion of such proceedings as to which the plan has been joined as a party if they would otherwise apply to such proceedings without reference to" Section 4363.2 (*ibid.*).

ignated beneficiary of an Employee or Retired Employee or other rights specifically provided in the Pension Plan, and **no pension, prospective pension, right or interest of an Employee or Retired Employee shall be subject to any order, decree, execution or other legal or equitable process or proceeding for the benefit of such spouse directed to the Fund.**³

In *In re Marriage of Campa*, Christine Campa instituted a marriage dissolution proceeding against her husband, Fernando Campa, by a petition filed in the Santa Clara County Superior Court on January 13, 1975. The parties entered into a marital property agreement whereby, among other things, Christine quitclaimed to Fernando her community property interest in a \$20,000 equity in the family residence and in return Fernando agreed that Christine would receive from "the monthly retirement benefits of [Fernando's] retirement through the Carpenters Pension Trust Fund the fraction which will have as its numerator $8\frac{1}{8}$ and as its denominator the total number of years credited to [Fernando's] retirement multiplied by the monthly benefit" (*Campa*, Cl. Tr. 15-19, 28-30). On November 25, 1975, an interlocutory judgment of dissolution of marriage was entered which incorporated the marital property agreement in its entirety (*Campa*, Cl. Tr. 14) and on December 16, 1975, a final judgment was entered which incorporated by reference all of the provisions of the interlocutory judgment (*Campa*, Cl. Tr. 21).

³Throughout this jurisdictional statement, emphasis is added unless otherwise noted. The full text of Section 6 of Article II is printed in Appendix D, with the 1975 modifications shown in italics.

Upon learning that, notwithstanding the marital property agreement and the interlocutory and final judgments, the Fund would not pay any portion of Fernando's prospective pension directly to her because such payment was prohibited by Section 6 of Article II of the Fund Trust Agreement, Christine obtained by stipulation an order that "that portion of the interlocutory judgment as incorporated in the final decree of dissolution in this matter entitled 6(g) regarding division of retirement benefits of [Fernando], is to be set aside in order to give this court further jurisdiction over the issue of retirement benefits" (*Campa*, Cl. Tr. 37-38). An order joining the Fund as a party to the proceeding was entered (*Campa*, Cl. Tr. 40) and summons and a petition re joinder were served on the Fund (*Campa*, Cl. Tr. 44, 50-51, 59-60).

The Fund removed the case to the federal district court for the Northern District of California, but that court, upon motion of Christine, remanded the case to the Santa Clara County superior court. The order granting the petition for remand is printed in Appendix E. Christine moved in the superior court for summary judgment against the Fund, and the Fund moved for an order dismissing it from the proceeding. Christine's motion was denied and the Fund's motion was granted on the ground that Christine was required by the Fund Trust Agreement and Pension Plan to submit her claim to the Board of Trustees of the Fund for determination (*Campa*, Cl. Tr. 188-189). Judgment to such effect was entered and Christine appealed.

In *In re Marriage of Durkin*, Joan Durkin instituted a marriage dissolution proceeding against her husband,

James Durkin, by a petition filed in the Santa Cruz County superior court on October 28, 1976 (*Durkin*, Cl. Tr. 1). Joan moved for an order that the Fund be joined as a party to the proceeding (*Durkin*, Cl. Tr. 67) and the order was granted (*Durkin*, Cl. Tr. 76). The Fund moved for summary judgment as to it and the motion was denied (*Durkin*, Cl. Tr. 220).

One of the principal community assets of the parties was an equity in the family residence estimated to have a value in excess of \$40,000 (*Durkin*, Cl. Tr. 227). Joan and James agreed that James should receive \$11,000 in cash plus one-half of the balance of the net proceeds of the sale of the residence (*Durkin*, Cl. Tr. 234) and in return James stipulated that Joan should be paid "that portion of the total monthly retirement [payable to him by the Fund] which equals one-half of the ratio of ten and one-half years to the total number of years [he] has accrued in and to said Fund at the time of his retirement" (*Durkin*, Cl. Tr. 235).

An interlocutory judgment of dissolution of marriage was entered, in which the court ordered that (*Durkin*, Cl. Tr. 235):

"the CLAIMANT CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA and RESPONDENT shall pay to PETITIONER as long as she lives, when RESPONDENT receives any retirement/pension sums from said CLAIMANT, that portion of the total monthly retirement which equals one-half of the ratio of ten and one-half years to the total number of years that RESPONDENT has accrued in and to said Fund at the time of his retirement."

The Fund appealed from the quoted portion of the judgment.

Bryant v. Carpenters Pension Trust Fund for Northern California differs from the first two cases in that it involved a direct action by Carolyn Bryant against the Fund and her divorced husband, William Bryant, instituted more than two years after her divorce from William became final.

On August 2, 1976, Carolyn filed a complaint for declaratory relief and to quiet title to personal property against William and the Fund (*Bryant*, Cl. Tr. 1-5). She alleged that the Fund was an employee pension benefit plan under ERISA; that she had been divorced from William by a final judgment of dissolution of marriage filed December 26, 1973; that she and her former husband owned a pension in the Fund which was not mentioned in the pleadings in the marriage dissolution proceedings and was not divided in the interlocutory judgment of dissolution of marriage entered therein; that thereby she and her former husband became owners of the pension as tenants in common, with the result that she became the owner of an undivided one-half interest therein; that her former husband disputed her claim; and that she desired a judicial declaration of her rights and an order that the records of the Fund be made to show that she is the owner of an individual one-half interest in the pension.

The Fund removed the case to the district court for the Northern District of California, but the case was remanded to the San Mateo County superior court upon the authority

of the earlier ruling in the *Campa* case. The order granting the petition for remand is printed in Appendix E.

The Fund moved for summary judgment on the ground (1) that ERISA had preempted all matters relating to the Fund insofar as they pertained to the action and (2) that Carolyn had not pursued or exhausted her contractual remedies under the Trust Agreement and the Pension Plan and had not complied with or otherwise met the requirements of the Agreement and Plan governing claims and rights against the Fund (*Bryant*, Cl. Tr. 59-83). The motion was denied, and after a trial, the Court found that Carolyn and William owned as community property a pension in the Fund which had not been mentioned in the pleadings in the marital dissolution proceeding and had not been divided in the interlocutory judgment entered in that proceeding; that William's pension rights had vested prior to the entry of the interlocutory judgment; that the Fund had the "pension funds" under its control; and that any provision in the Fund Trust Agreement limiting remedies for potential claims "are contractual in nature and are not binding on persons who are not parties to the agreement who are asserting a community property interest" (*Bryant*, Cl. Tr. 112-113).

The Court concluded as a matter of law that the Fund was subject to and bound by the decision of the Court; that the Fund should be ordered to pay directly to Carolyn at a time when William began to receive pension funds "a sum equal to a proportion of his total earned pension payments as set forth in the following formula:

$$\frac{1}{2} \times \frac{172 \text{ credits (in Twelfths)}}{\text{Total Number of Credits (in Twelfths) Earned prior to Retirement;}}$$

that the Court reserved jurisdiction over the Fund in order to supervise and secure such payment for Carolyn; and that in the event the law was interpreted in the future so that the Fund is not bound by the Court's decision, William should be personally liable to Carolyn for the payments (*Bryant*, Cl. Tr. 113-114).

William testified at the trial that he had remarried on January 18, 1974, less than one month after the final dissolution of his marriage to Carolyn, that he was still working as a carpenter in Northern California, that he was 43 years old and that he had made no plans for retirement (*Bryant*, R. Tr. 18-19).

Judgment in accordance with the findings of fact and conclusions of law was entered on September 21, 1977 (*Bryant*, Cl. Tr. 115-118) and the Fund thereafter appealed (*Bryant*, Cl. Tr. 119).

The three appeals were heard by a single panel of the California Court of Appeal. On the main issue—that of preemption—the Court relegated to a footnote most of the provisions of Section 514 of ERISA, 29 U.S.C. § 1144, and did not at any point analyze the language of that Section, the important part the Section plays in the statutory scheme or the significance of the Section's extensive and explicit legislative history.

It catalogued some of the provisions of ERISA, characterized the effect of the California community property law upon an employee pension benefit plan as being no more

than requiring the plan "to send two monthly checks instead of one" and concluded that such requirement "does not interfere with any of the Congressional objectives" (App. A, p. A-13).

In responding to some of the arguments pressed by the Fund, the Court at first characterized "as clearly without merit" the argument that California's treatment of pension benefits in marriage dissolutions contravened ERISA's objectives of rewarding employees for long service, furthering the interest of employers in a stable work force, insuring financial security for retired employees and providing security for the retired worker's surviving spouse, citing *In re Marriage of Hisquierdo* (1977) 19 Cal.3d 613, 566 P.2d 224, and *In re Marriage of Fithian* (1974) 10 Cal.3d 592, 517 P.2d 449. After the decision of this Court in *Hisquierdo v. Hisquierdo* (1979) _____ U.S. _____, 99 S.Ct. 802, however, the Court of Appeal dropped its observation as to the merit of the argument and its citation of the *Hisquierdo* case and merely said that the argument had been rejected by the California Supreme Court in *Fithian* (App. A, p. A-26).

The Court of Appeal reversed the judgment in *Campa* and directed entry of summary judgment against the Fund. It affirmed the judgments in *Durkin* and *Bryant*.

The opinion of the Court of Appeal was filed on February 2, 1979. It was apparent that the Court had not been aware of this Court's decision in *Hisquierdo v. Hisquierdo*, *supra*, announced on January 22, 1979, and a petition for rehearing was filed, drawing attention to that decision and urging that the reasoning of the decision called for a reexamination of the decision in the *Campa-Durkin-Bryant* cases. The re-

hearing was denied on the ground that in *Hisquierdo* this Court had "expressly distinguished ERISA and established that the decision did not reach it" and that *Hisquierdo* did not affect the cases before the Court of Appeal.

The Fund's petition for a hearing by the California Supreme Court was denied on April 12, 1979.

**THE FEDERAL QUESTIONS ARE SUBSTANTIAL
AND THEY SHOULD BE SETTLED BY THIS
COURT AS SOON AS POSSIBLE**

There can be no question as to the importance of ERISA to the well-being and protection of the participants and beneficiaries of private employee pension benefit plans, nor can there be any question as to the importance of the preemption provisions of Section 514 to the statutory scheme of Congress. Congressman Dent, one of the principal sponsors of ERISA in the House, characterized those provisions as "the crowning achievement of this legislation" (see *Hewlett-Packard Co. v. Barnes*, *supra*, 425 F.Supp. at p. 1299), and the Secretary of Labor has called the provisions "a key element of the Congressional intent in enacting ERISA" (*amicus curiae* brief filed on the appeal in *Stone v. Stone*, 9th C.A. No. 78-2313, BNA Pension Reporter No. 221, January 8, 1979, p. R-8). If the judgment below is permitted to stand, however, it will make a shambles of the preemption provisions insofar, at least, as plans reachable by the process of California courts are concerned and it will seriously impair the protection afforded by those provisions to plans generally.

The decision of the California Court of Appeal is in direct conflict with the plain terms of Section 514 and was

reached in deliberate disregard of the repeated admonitions of this Court that "[t]he starting point in every case involving the construction of a statute is the language itself" (*International Brotherhood of Teamsters, Etc. v. Daniel* (1979) _____ U.S. _____, 99 S.Ct. 790, 795, and cases cited). The decision cannot settle the preemption issue even for plans located entirely in California since the Secretary of Labor, who is charged with the administration of Title I of ERISA, including the enforcement of the fiduciary obligations of plan administrators (Section 502(a)(2), (5), 29 U.S.C. § 1132(a)(2), (5)), has taken a position on that issue contrary to the position of the California court (*amicus curiae* brief, *supra*, BNA Pension Reporter No. 221, pp. R-9 to R-12). Nevertheless, if this Court does not note probable jurisdiction and set this appeal down for plenary consideration, the attorneys who represent the non-employee spouses in the scores of marital dissolution proceedings in which appellant has been named as a party claimant, and in similar proceedings which are being filed every month, can no longer be held at bay.⁴

⁴In many of the marital dissolution proceedings listed in footnote 1, *supra*, counsel for the party joining appellant as a claimant has stipulated to an order reserving the issues of benefits, if any, to be paid by appellant to the petitioner or respondent in the proceeding, or both, and the manner of payment of such benefits, for trial at a later date, and that all objections by appellant, including objections to jurisdiction, are to be reserved until the above issues are tried. A sample copy of the stipulation and order currently being used is printed in Appendix F. The reserved issues are as ripe for the decision of this Court upon this appeal as they will ever be, and unless the Court sets the appeal down for plenary consideration, all persons concerned with the massive litigation generated by the California joinder procedure—the parties, their counsel and the court—will spend incalculable sums and untold hours in the trial of issues which can only be authoritatively settled by this Court.

The California courts have held that an attorney representing the non-employee spouse in a marital dissolution proceeding who does not pursue his client's claim under the community property laws to a share in the employee spouse's pension is guilty of malpractice (*Smith v. Lewis* (1975) 13 Cal.3d 349, 530 P.2d 589). Thus, even attorneys who concede the validity of the Fund's position upon reading Section 514 will have no alternative but to invoke on behalf of their clients the remedies provided by the California law. These remedies include the right to a restraining order preventing any payment of benefits to the employee spouse until the rights of the non-employee spouse have been determined (California Civil Code, Sections 4351, 4359)⁵ and the right to proceed against the Board of Trustees of the Fund for contempt if it complies with the provisions of the Fund Trust Agreement and refuses to honor an order for the payment of a portion of such benefits to the non-employee spouse (California Civil Code, Section 4380; *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 141 Cal.Rptr. 506; *Verner v. Verner* (1978) 77 Cal.App.3d 718, 728, 143 Cal.Rptr. 826, 832).

The questions presented by the appeal can only be settled by this Court, and the litigation pending and threatened against the Fund, and against every other similar employee

⁵The form of Pleading on Joinder-Employee Pension Benefit Plan (Family Law) adopted by Rule 1291.35 of the California Rules of Court includes the following as part of the relief that may be granted to the party seeking joinder of a Plan as a party claimant:

"b. [] An order restraining claimant from making benefit payments to employee spouse pending the determination and disposition of non-employee spouse's interest, if any, in employee's benefits under the Plan."

pension benefit plan in California emphasizes the urgency of settling the questions at the first opportunity. It is inconceivable that the California courts should be permitted by default to write an implied exception into Section 514 of ERISA, a federal statute, particularly since that exception (a) would create a new class of plan participants contrary to the statutory definition of that term (ERISA, Sec. 3 (7), 29 U.S.C. § 1002(7)), namely, the divorced spouse of a plan participant,⁶ (b) would permit state courts to issue restraining orders preventing the prompt payment of pension benefits contrary to the provisions of Section 206(a) of ERISA, 29 U.S.C. § 1056(a) (see *supra*, p. 19; *Kulchin v. Spear Box Co., Inc. Retirement Plan* (S.D. N.Y. 1978) 451 F.Supp. 306, 311), and (c) would also permit state courts to declare plan provisions invalid under state law and to order plan fiduciaries to act contrary to such provisions, in violation of the requirements of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D) and the intention of Congress that the federal courts should have exclusive jurisdiction to adjudicate the content of fiduciary duties under ERISA (see *Wong v. Bacon* (N.D. Cal. 1977) 445 F.Supp. 1177, 1187-1188, *infra*, pp. 40-41).

⁶The California Court of Appeal relied heavily upon the decision of the district court in *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, appeal pending No. 78-2313 (9th C.A.) (see App. A, pp. A-7, A-13, A-15). In *Stone* the district court held that a non-employee spouse awarded a community share of the employee's pension benefit in a marital dissolution proceeding is a transferee of the employee participant and as an incident to such transfer acquires the right to sue the pension benefit plan for her share of the benefits as a "participant" within the meaning of Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (450 F.Supp., pp. 921, 933, n. 17).

It is apparent from the opinion of the California Court of Appeal that that Court was motivated primarily if not entirely by its desire to assure that a plan participant's ex-wife "partakes of the pension to the extent that it was earned as a result of the community effort" (App. A, pp. A-14-A-15). It belittled the impact of the California community property law and concomitant joinder proceedings upon appellant and its participants, suggesting that all that was involved was a request that appellant "send two monthly checks instead of one" (App. A, p. A-13). The fact is, however, that many aspects of the California law have a seriously adverse impact upon employee pension benefit plans and their participants (see *infra*, pp. 26-39) and as was most recently demonstrated in *Hisquierdo v. Hisquierdo* (1979) ____ U.S. ____, 99 S.Ct. 802, this Court alone is qualified to determine whether Congress intended to protect appellant and similar employee pension benefit plans against such impact.

The pendency of the appeal in *Stone v. Stone*, *supra*, should not deter the Court from noting probable jurisdiction of this appeal. The district court took jurisdiction of the *Stone* action on the theory that the plaintiff had the right to sue the defendant pension plan under Section 502 (a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), as a participant in the plan (see *supra*, p. 20, n.6). If the Court of Appeals disagrees with this conclusion, it may well reverse the judgment for lack of federal jurisdiction and either direct that the action be dismissed (see *Guthrie v. Dow Chemical Co.* (S.D. Tex. 1978) 445 F.Supp. 311, 315) or that it be remanded to the state court (compare *American*

Fire & Casualty Co. v. Finn (1951) 341 U.S. 6, 18, 71 S.Ct. 534, 452).

Aside from the jurisdictional issue, the Secretary of Labor has urged that the judgment of the district court be affirmed "on the basis that there is an implied exception in the anti-assignment provisions of ERISA for state court decrees ordering payment of a portion of a benefit based on community property claims to the spouse or former spouse of a participant whose pension is in pay status" (*amicus curiae* brief, BNA Pension Reporter No. 221, *supra*, p. R-14). The position of the Secretary on this point does not affect appellant's appeal since none of the pensions involved in the appeal is in pay status, and if the Court of Appeals were to affirm the judgment on the ground urged, appellant would be left without guidance on the matters at issue here. Finally, if the Court of Appeals were to reverse the judgment on the merits and hold that ERISA preempts all state judgments and orders in marital dissolution proceedings as they relate to covered employee pension benefit plans, and if this Court denies review for the reason that the holding is correct, appellant would be embroiled in further litigation testing the binding effect in the state courts of the decision of the Court of Appeals.

Thus, if the fiduciaries of employee pension benefit plans covered by ERISA are to receive the judicial guidance on this important issue which they need and deserve, such guidance must come from this Court and should not be delayed. Plan fiduciaries risk personal liability if they guess wrongly as to whether the position of the California courts or the position of the Secretary of Labor on the issue of

preemption will ultimately prevail (see ERISA, Section 409(a), 29 U.S.C. § 1109(a), *Wong v. Bacon* (N.D. Cal. 1977) 455 F.Supp. 1177, 1185, *supra*). Plan participants and their divorcing or divorced spouses also need authoritative guidance as soon as it can be provided. The marital dissolution proceedings in which appellant has been named as a party claimant are merely the tip of an iceberg. Appellant receives inquiries regarding marital dissolution matters on almost a daily basis from participants, their spouses or their respective attorneys and until the impact of ERISA upon the community property laws has been authoritatively settled, these inquirers and persons similarly situated will be making important decisions based on premises which may ultimately prove to be erroneous.

ARGUMENT

I

The provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee pension benefit plan covered by that Act.

Section 514 of ERISA, 29 U.S.C. § 1144, provides as follows:

"(a) Except as provided in subsection (b) of this section, the provisions of this title [Title I] and Title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

“(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

“(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State **which regulates insurance, banking, or securities.**

“(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

“(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

“(4) **Subsection (a) shall not apply to any generally applicable criminal law of a state.**

“(c) For purposes of this section:

“(1) The term ‘State law’ includes all laws, **decisions, rules, regulations, or other State action having the effect of law**, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

“(2) The term ‘State’ includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, **directly**

or indirectly, the terms and conditions of employee benefit plans covered by this title.

“(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.”

The legislative history of Section 514, recounted in *Hewlett-Packard Co. v. Barnes* (N.D. Cal. 1977) 425 F.Supp. 1294, at pp. 1297-1300, cited *supra* at p. 17, dispels any doubt that Congress intended exactly what it said and that its objective was to accomplish preemption “in its broadest sense”.

See:

- Wadsworth v. Whaland* (1st C.A. 1977) 562 F.2d 70, 77; cert. den. 435 U.S. 980, 98 S.Ct. 1630;
- Marshall v. Chase Manhattan Bank* (2d C.A. 1977) 558 F.2d 680, 683;
- Azzaro v. Harnett* (S.D.N.Y. 1976) 414 F.Supp. 473, aff’d (2d C.A. 1977) 533 F.2d 93, cert. den. 434 U.S. 824, 98 S.Ct. 71;
- Alvarez v. Erickson* (9th C.A. 1975) 514 F.2d 156, 161;
- Standard Oil Co. v. Agsalud* (N.D. Cal. 1977) 442 F.Supp. 695, 707;
- Bell v. Employee Sec. Ben. Association* (D.Kan. 1977) 437 F.Supp. 382, 385-387;
- Guthrie v. Dow Chemical Company* (S.D. Tex. 1978) 445 F.Supp. 311, 314.

Congress expressly specified the State laws that were excepted from preemption in subsections (b)(2)(A) and (b)(4) of Section 514 and made as clear as language could

do that no other exceptions were intended (see *National Carriers' Conference Committee v. Heffernan* (D.Conn. 1978) 440 F.Supp. 1280, 1284). It is sufficient for reversal, therefore, that the judges of the California court refused to be bound by the clearly expressed command of a law of the United States, in violation of Article 6, Clause 2 of the United States Constitution.

We point out further, however, that the California court acted upon an erroneous premise, namely, that the only impact of the California community property laws upon an employee pension benefit plan is to require the plan, in the event of the dissolution of the marriage of a participant, "to send two monthly checks instead of one" (App. A, p. A-13). The impact of the California community property law upon such plans is far more pervasive, as is demonstrated by the following analysis of certain key principles of that law as they relate to the plans:

- (1) **The spouse of a participant in an employee pension benefit plan acquires an enforceable property interest in the participant's prospective pension as soon as the participant earns the smallest allowable fraction of a pension credit.**

This principle was first established by the California Supreme Court in *In re Marriage of Brown* (1976) 15 Cal. 3d 838, 544 P.2d 561, which overruled the earlier decision of the Court in *French v. French* (1941) 17 Cal.2d 775, 112 P.2d 235, that a divorcing spouse has no interest in a pension right which is not vested.

As applied to the Carpenters Pension Plan in effect prior to August 31, 1976, the principle meant that a carpenter's spouse acquired a property interest in the carpenter's

prospective pension as soon as the carpenter worked 300 or more hours in a calendar year in covered employment, if he was less than 55 years of age; 250 hours, if he was between 55 and 59 years of age; and 200 hours if he was 60 years of age or over. As applied to the Plan as revised to comply with ERISA effective September 1, 1976, the principle means that the spouse's property interest is acquired as soon as the carpenter works 300 hours in a calendar year in such employment.

One of the important objectives of ERISA was to preserve and further the interests of the employer in securing the benefits of a stable work force (compare *Alabama Power Co. v. Davis* (1977) 431 U.S. 581, 97 S.Ct. 2002, 2009-2010). The sponsors of the Act successfully opposed an amendment which would have provided limited vesting during the first through fifth years of a participant's employment on the ground that the amendment would favor "younger employees who do not stay too long at their job" and would take away from "older employees who do stay with the company" (Legis. Hist., p. 1976).⁷ The sponsors argued that "one of the motivating reasons for putting in the plans is that employers want the employees to stay with them for awhile, because they are going to spend money training those employees" (*ibid*; see also, Legis. Hist., pp. 1800-1801, 1860).

Under the Carpenters Plan, as permitted by ERISA, a participant does not achieve vested status until he has accumulated at least 10 years of vesting service or 10 full

⁷References in this statement to "Legis. Hist." are to Committee Print, 94th Congress, 2d Session, Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, Prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, April 1976.

(1200 hours per year) pension credits, or has attained age 62. A younger carpenter who has not met any of these vesting conditions and who has been subjected to a marital dissolution decree determining that his divorced spouse has a one-half community property interest in his accumulated pension credits has a strong incentive to leave covered employment and to take his experience and skills to another industry. If he stays in covered employment, achieves vested status and ultimately retires after twenty-five years of service subsequent to his divorce, his divorced spouse will take her proportionate share of his pension calculated at the benefit unit value in effect at the time of his retirement rather than at the time of the divorce (see *infra*, pp. 30-32). On the other hand, if he leaves covered employment for another industry, where his experience and skills may have equal or greater value, he will wipe out the non-vested interest of his divorced spouse along with his own, and may still have time within which to acquire the maximum pension available through his new employment.

In *Hisquierdo v. Hisquierdo*, *supra*, this Court recognized that incentives of the sort described disrupt the national scheme and call for preemption of the offending state law (99 S.Ct. at p. 802).

- (2) The one-half community property share of the spouse accrues automatically with each month that the marriage continues and is enforceable against the participant without regard to the effect of such accrual upon the ability or the willingness of the participant to retire.**

From the standpoint of both the employers and the employees who negotiate employee pension benefit plans one

of the important objectives of such a plan is to encourage older employees to retire and make way for younger workers (see *Alabama Power Co. v. Davis*, *supra*, 97 S.Ct. at p. 2010). An employee who retires voluntarily after age has impaired his efficiency can be replaced by the employer without the stress and the risk of discharge. Employees as a group are likewise benefitted by the voluntary retirement since the work the retiree would otherwise be performing is made available to younger men. So important is this objective to the employers and employees participating in the Carpenters Plan that the Plan provides for a service pension equivalent in value to the regular pension payable at age 62, which can be earned by a carpenter who accumulates 30 full pension credits at any age and which terminates if the carpenter returns to covered employment.

There can be no question but that the California community property law, by reducing the benefits a divorced employee can receive upon retirement, "discourages the divorced employee from retiring" and "provides the employee with an incentive to keep working, because the former spouse has no community property claim to salary earned after the marital community is dissolved" (*Hisquierdo v. Hisquierdo*, *supra*, 99 S.Ct. at p. 810). In enacting ERISA Congress wanted to encourage pension plans (Legis. Hist., pp. 1800-1801), and by reversing "the flow of incentives" intended by the sponsors of such plans, the California law frustrates the Congressional objective (*Hisquierdo v. Hisquierdo*, *supra*).

- (3) In the division of pension rights between the spouses the years of service during the marriage must be given just as much weight in computing total service as the years of service after the dissolution of the marriage.

In both *Durkin* and *Bryant* the formula fixed by the court as the basis for dividing the pension benefit between the divorced spouses upon the retirement of the participant spouse gives each unit of pension credit equal value. This is a simplistic formula, based on decisions of the California courts (see *In re Marriage of Anderson* (1976) 64 Cal.App.3d 36, 39, 134 Cal.Rptr. 252, 253; *In re Marriage of Judd* (1977) 68 Cal.App.3d 515, 523, 137 Cal.Rptr. 318, 321), which cannot be justified by the concept upon which the community treatment of pension benefits is based; namely, that such benefits "are properly part of the consideration earned by the employee" (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596, 517 P.2d 449, 451, cert. den., 419 U.S. 825, 95 S.Ct. 41).

In the case of the Carpenters Plan employer contributions to the Pension Fund commenced in 1957 at the rate of 10 cents per hour and have increased at approximately annual intervals to the rate of \$1.81 per hour effective July 1, 1978, as shown in the footnote.⁸ The monthly benefit amount per year of pension credit has increased cor-

Date	Rate	Date	Rate
July 1962	\$.15	January 1972	\$.55
June 1963	.20	June 1973	.80
July 1965	.25	September 1974	.85
July 1966	.30	April 1975	1.15
July 1967	.35	July 1975	1.23
August 1968	.40	September 1975	1.26
July 1969	.45	July 1976	1.71
July 1970	.50	July 1978	1.81

respondingly from \$2.00 in 1958 to \$25 in January, 1977, and is still spiraling upward.

It is likely, therefore, that when the participant spouses in *Durkin* and *Bryant* retire, the respective shares of their divorced spouses in the pension benefits will be disproportionately high when the total employer contributions received with respect to the participant's work during the marriages are compared with the total contributions received with respect to such work after the marriages were dissolved. If a pension payment "serves as a remuneration for services rendered by the employee" (*In re Marriage of Wilson* (1974) 10 Cal.3d 851, 855, 519 P.2d 165, 167), the spouse who was married to the carpenter while his work earned a \$1.81 per hour contribution to the Pension Fund clearly has a greater property interest per pension credit than a spouse who was married to the carpenter while his work earned only a 10¢ per hour contribution to the Fund.

The "equal weight" formula was developed in litigation to which only the employee and his divorcing spouse were parties. If the community property law applied to the Carpenters Fund, the Board of Trustees would have to concern itself not only with the rights of the first spouse, but also with those of the second, third or fourth spouse, and ultimately with those of the surviving spouse, since all of these successive spouses could challenge the court's determination as to the rights of the first spouse. The surviving spouse, unlike any prior spouse, falls within the definition of "beneficiary" in ERISA (see Section 3(8), 29 U.S.C. § 1002(8)) and hence she is one of the persons whose interests must be the sole and exclusive concern of the

Board of Trustees under ERISA (see Section 404(a)(1); 29 U.S.C. § 1104(a)(1)).

These considerations point up the fact that, as recognized almost 30 years ago, the "existence and operation of community property laws create potential difficulties and dangers in the administration of pension or retirement income plans" (Kent, *Pension Funds and Problems under California Community Property Laws* (1950) 2 Stan. L. Rev. 447, 470). The author of the Stanford Law Review article, and the district court in *Stone v. Stone*, *supra*, suggest that a pension plan can protect against these difficulties and dangers by interpleading conflicting claimants (2 Stan. L. Rev. at p. 469; 450 F.Supp. at p. 930). We submit, however, that nothing would be more disruptive of the purposes and objectives of an employee pension benefit plan than to require that the board of trustees of the plan withhold the payment of benefits to participants pending the final disposition of interpleader or other judicial proceedings to resolve conflicting claims.

In the case of a plan such as the Carpenters Plan, the plan participants normally work for hourly wages paid at weekly intervals. When the average carpenter retires, his pension benefits take the place of his weekly wage and he is dependent for the support of himself and his family upon the prompt payment of the benefits as they come due. He cannot and should not be expected to await the resolution through litigation of conflicting claims to the promised benefits which ERISA was intended to protect and which ERISA requires to be paid promptly (see Section 206(a), 29 U.S.C. § 1056(a); *Kulchin v. Spear Box Company, Inc. Retirement Plan*, *supra*).

(4) Property which is not mentioned in the pleadings in a marital dissolution proceeding as community property is left unadjudicated by a decree of dissolution and is subject to future litigation, the parties being tenants in common meanwhile.

This principle, which was called a "settled principle" by the Court in *In re Marriage of Brown*, *supra*, 15 Cal.3d at pp. 850-851, was applied in the *Bryant* case. The California law does not establish any clear time limits for the future litigation contemplated by the principle. The statute of limitations is set in motion only when one co-tenant repudiates the existence of the co-tenancy (*Willmon v. Koyer* (1914) 168 Cal. 369, 373, 143 P. 694, 695; *Regalado v. Regalado* (1961) 198 Cal.App.2d 549, 554, 18 Cal.Rptr. 468) and where pension rights have not been mentioned in a marriage dissolution proceeding, the participant is not likely to repudiate the co-tenancy created by such omission until his former spouse asserts its existence. Thus, the co-tenancy may subsist until the participant dies or retires, possibly many years after the dissolution of the marriage out of which it arose (see *Green v. Green* (1944) 66 Cal.App.2d 50, 59, 151 P.2d 679; *Tabler v. Peverill* (1906) 4 Cal.App. 671, 676, 88 P. 994, 996).

In *In re Marriage of Brown*, *supra*, in overruling the decision in *French v. French*, *supra*, that a divorcing spouse has no interest in a pension right which is not vested, the California Supreme Court recognized that the "future litigation" contemplated by the principle applied in the *Bryant* case might occur as much as 35 years after dissolution of the marriage. It sought to ameliorate some of the injustices

of the principle by limiting the retrospective effect of its overruling decision, saying (15 Cal.2d at p. 851):

"We conclude that our decision today should not apply retroactively to permit a nonemployee spouse to assert an interest in nonvested pension rights when the property rights of the marriage have already been adjudicated by a decree of dissolution or separation which has become final as to such adjudication, unless the decree expressly reserved jurisdiction to divide such pension rights at a later date (see Civ. Code, § 4800)."

The Court's conclusion, however, does not protect appellant and appellant's participants against stale claims in cases where a participant's rights were vested prior to the interlocutory judgment, or in cases arising after the *Brown* decision involving both vested and nonvested rights, or in the increasing number of cases in which the court expressly reserves jurisdiction to divide pension rights at a future date (see *In re Marriage of Skaden* (1977) 19 Cal.3d 679, 689, 566 P.2d 249, 254). Thus, the litigation of stale claims long after a participant's marriage has been dissolved is added to the burden of "endless litigation" which the California community property laws have thus far generated for employee pension benefit plans, contrary to the expressed will of Congress (*supra*, p. 4).

(5) The participant in an employee pension benefit plan may anticipate his prospective pension benefits by transferring an interest in such benefits to his divorcing spouse in return for a greater share in other property subject to division upon divorce.

In both *Campa* and *Durkin* the participant in appellant's plan received a substantial share of the equity in the family

residence in return for his agreement that his spouse could have a share in his prospective pension under the plan (*supra* pp. 10, 12). Thus, due to the fortuity of the marriage dissolution proceedings, the participant was able to "cash out" a portion of his pension.

A prohibition against anticipation is an essential feature of a pension plan. If a participant in the plan can anticipate his benefits before they become payable as provided in the plan, he can convert the plan into a savings plan, contrary to the intent of the employers who support the plan and contrary to the intent of Congress which provides tax exemptions on the theory that the benefits are not immediately available to the participant.

Congress intended to impose such a prohibition. It provided in Section 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Section 1021(c) of ERISA added a new paragraph (13) to Section 401(a) of the Internal Revenue Code containing substantially the same provisions as Section 206(d)(1). The purpose of these provisions was to "further ensure that the employee's accrued benefits are actually available for retirement purposes" (Legis. Hist., pp. 2655-2656, 3148, 3188-89, 3318, 3322, 3429).

Stated bluntly, the decree in *Durkin* and the decree directed by the Court of Appeal in *Campa* sanction a blatant violation of the intent and purpose of Section 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), and Section 401(a)(13) of the Internal Revenue Code. The theory is that the divorcing spouse is an owner rather than an assignee of a

community property share in the participant's interest in his prospective pension. The fact is that when the participant reaches retirement age, the portion of his accrued benefits awarded to his divorced spouse will not be available to him for retirement purposes.

(6) An employee pension benefit plan can be joined as a party to a marital dissolution proceeding by order of the court clerk upon application of any other party to the proceeding, and no order or judgment in such a proceeding is enforceable against the plan unless it is so joined.

As already noted, the joinder procedure is provided for by statute (California Civil Code, Sections 4363.1 and 4363.2), as supplemented by court rule (California Rules of Court, Rules 1253, 1255, 1256). Unless otherwise provided in the statute or court rules, "the law applicable to civil actions generally shall govern all pleadings, motions, and other matters pertaining to that portion of the proceeding as to which a claimant has been joined as a party to the proceeding in the same manner as if a separate action or proceeding not subject to these rules had been filed" (California Rules of Court, Rule 1255).

Thus, once joined as a party, an employee pension benefit plan is exposed to the full panoply of civil procedures and remedies, such as restraining orders, depositions, interrogatories, requests for admission, discovery and production of documents and sanctions for the refusal or failure to comply with any of these procedures.

The plan is likewise exposed to an award of attorneys fees. In *In re Marriage of Reyes*, now pending on appeal

before the California Court of Appeal, Fifth Appellate District, 5 Civil No. 3623, appellant Carpenters Pension Plan appeared in response to a joinder petition in a marriage dissolution proceeding and thereafter appealed from an order that it make pension payments directly to the participant's spouse. The spouse claimed an award of attorney's fees against the Plan under California Civil Code Section 4370 and when the award was refused she appealed to the Court of Appeal on that issue. While the decision of the superior court denying the spouse's claim is sound, appellant is justifiably concerned that if the California courts are permitted to write an implied exception from preemption into Section 514, the arguments used to secure that exception will be stretched to support an award of attorneys fees.

Of equal concern is the fact that under the holding of the district court in *Stone v. Stone, supra*, the spouse of a participant in an employee pension benefit plan is the transferee of the participant and may bring an action as such transferee under Section 502(a)(1)(B) "to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan." State courts are given concurrent jurisdiction with federal district courts of actions under this subsection (Section 502(e)(1)) and in any such action by a participant, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party" (Section 502(g)).

This court may well ask why these provisions are of concern to appellant, since the Carpenters Plan provides

expressly that the "rights of a spouse of any Employee or Retired Employee shall be limited to a community property share of the pension actually received by a Retired Employee, after such receipt, and to rights of the designated beneficiary of an Employee or Retired Employee or other rights specifically provided in the Pension Plan" (*supra*, pp. 9-10). The answer is that appellant received short shrift from the California courts in *Campa-Durkin-Bryant*.

The Court of Appeal ignored the quoted provisions of the Carpenters Plan and in effect held them to be invalid *sub silentio*. The Court, in its opinion as initially filed, characterized appellant's arguments for preemption as "clearly without merit" (App. A, p. A-14), as irrelevant (*ibid.* p. A-16), as "untenable" (*ibid.* p. A-17) and as "wholly without merit" (*ibid.* p. A-20). In denying a rehearing the Court tempered the first of these characterizations, presumably in recognition that at least some of the arguments had the support of this Court in *Hisquierdo v. Hisquierdo*, *supra*, but it left the remainder untouched (App. A, pp. A-26, A-27). A rehearing was denied by the Court of Appeal and a hearing was denied by the California Supreme Court notwithstanding that the reasoning of the Court of Appeal conflicted in material respects with the reasoning of this Court in *Hisquierdo v. Hisquierdo*, *supra*, and that its reasoning and holding were in direct conflict with interpretations of ERISA issued by the Secretary of Labor subsequent to the argument and submission of the appeals. In view of this record, and the pressures imposed upon counsel in domestic relations matters by the holding in *Smith v. Lewis* (1975) 13 Cal.3d 349, there is ample reason to believe that if the judgment below is permitted to stand,

many of the joinder proceedings against appellant and other employee pension benefit plans similarly situated will be quickly converted into actions under Section 502(a)(1)(B) and the "endless litigation" envisioned by Senator Javits will not end with the decision on the merits but will also encompass hearings as to what portion of the spouse's attorneys fees shall be borne by the plan.

II

A state court does not have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan.

Both the language and the legislative history of ERISA make clear that Congress intended that the federal courts should have exclusive jurisdiction to "elaborate the broad fiduciary standards laid down in ERISA", to instruct plan trustees as to how their fiduciary duties should be performed and to issue such orders as are appropriate to the performance of the duties (see *Wong v. Bacon* (N.D. Cal. 1977) 445 F.Supp. 1177, 1186).

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), provides that "a civil action may be brought . . . (2) by the secretary [of Labor] or by a participant, beneficiary or fiduciary for appropriate relief under Section 409 [or] (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan or (B) to obtain appropriate relief (i) to redress such violation or (ii) to enforce any provision of this title or the terms of the plan," and Section 502(e) (1)

provides that "[e]xcept for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary."

The Conference Committee explained the purpose of these provisions to be as follows (Legis. Hist., p. 4594):

"Under the conference agreement, civil action may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. **The U.S. District Courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under Title I.**"

See *Guthrie v. Dow Chemical Co.* (S.D. Tex. 1978) 445 F.Supp. 311, 314.

The concept that fiduciaries of employee benefit plans covered by ERISA are to look exclusively to the federal courts for guidance in the discharge of their fiduciary duties, and are answerable solely to the those courts when they are charged with a violation of duty, is vital to the achievement of the objectives of that Act. As the court said in *Wong v. Bacon, supra*, 445 F.Supp. at pp. 1185-1186.

"The duties of fiduciaries established by ERISA are often unclear in the face of conflicting claims on the assets of the benefit plans by participants, beneficiaries and contributing employers. **Under these circumstances, fiduciaries have a strong need to obtain guidance from the courts. Without such guidance,**

either they would have to make payment to a claimant and risk civil liability under § 409 if they misconceived their duty, or they would have to refuse to pay a claimant and risk a lawsuit by that claimant."

* * *

"The appropriateness of a Federal, as distinguished from State, forum is signalled by Congress' decision in § 502(e)(1) to give Federal courts exclusive jurisdiction over claims involving breach of fiduciary duties. Congress wanted Federal courts to elaborate the broad fiduciary standards laid down in ERISA."

The fiduciary duties implicated on this appeal are those stated in Section 404(a) of ERISA, 29 U.S.C. § 1104(a), which provides as follows:

"(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan **solely in the interests of the participants and beneficiaries and—**

"(A) for the **exclusive** purpose of:

"(i) **providing benefits to participants and their beneficiaries; and**

"(ii) defraying reasonable expenses of administering the plan;"

* * *

"(D) **in accordance with the documents and instruments governing the plan** insofar as such documents and instruments are consistent with provisions of this title."

California superior courts are routinely issuing *ex parte* orders restraining appellant from making benefit payments to plan participants pending the determination and disposition by the superior courts of the interests of the participants' divorcing spouses, if any, in the participants'

plan benefits (see *supra*, p. 19). After trials at which the objections of appellant are summarily overruled on the basis of state law, the superior courts are issuing orders and entering decrees which require appellant to withhold benefit payments from participants and to make benefit payments to non-participants, notwithstanding that such action is expressly prohibited by the documents and instruments governing appellant's plan and is in unquestioned violation of Section 404(a)(1)(A) and (D) of ERISA, 29 U.S.C. § 1104(a) (1) (A) and (D) (see *supra*, p. 20). And in the one case thus far in which the participant's pension was in pay status and which has proceeded to judgment (*Marriage of Skinner*, San Mateo County No. 204870), counsel for the prevailing spouse threatened to cite all the members of the board of trustees of appellant for contempt unless the board immediately authorized payments to his client in accordance with the decree of the San Mateo County superior court.

The situation would be amusing if it were not so serious. There are fourteen members of the board of trustees of appellant, seven appointed by employer associations to represent individual employers and seven appointed by employee organizations to represent employees. They all serve without compensation from the Fund. They serve voluntarily, at considerable personal sacrifice in time and money, and nothing would be more destructive of the objectives of ERISA than to have them hauled up before a state court judge to receive a tongue lashing because of their adherence to the clearly expressed command of Section 404(a)(1)(A) and (D) of ERISA.

As we have pointed out (*supra*, p. 20), the California courts have undertaken to write an implied exception into the preemption provisions of ERISA which saves from preemption orders and decrees in marital dissolution proceedings based upon the community property laws. It is difficult to see how Congress could have intended any implied exceptions to Section 514, both because it carefully spelled out certain express exceptions and because the inevitable result of an implied exception is to require plan fiduciaries to litigate the existence and scope of the exception through to a final determination by this Court. Nevertheless, the United States Court of Appeals for the Second Circuit, guided in part by the district court in *Stone v. Stone*, *supra*, which the California courts found so persuasive, has itself undertaken to write another implied exception to Section 514, saving from preemption a state court's garnishment order directed at pension payments to satisfy a spouse's court ordered support obligations (*American Tel. & Tel. Co. v. Merry* (2d C.A. 1979) 592 F.2d 118; *Cody v. Rieker* (2d C.A. 1979) 594 F.2d 314, 316).

The appellants in the *Merry* case were the fiduciaries of the plan to which the garnishment order was directed. In answering their argument that compliance with the order would subject them to claims of breach of fiduciary duty, the Court said (592 F.2d at p. 125):

"Appellants' protestations that compliance with Mrs. Merry's state court garnishment order will subject them to claims of breach of fiduciary duty under ERISA § 404(a) (1), 29 U.S.C. § 1104(a)(1), are unfounded in light of our judicial determination that an implied exception exists under the statute's own terms solely for court ordered support payments to

dependents. It has long been the rule that fiduciary conduct is subject to judicial guidance and that a fiduciary acting pursuant to a court's instructions is protected from assertions of breach of duty. III Scott on Trusts § 259, at 2217 (3d ed. 1967)."

And in answering appellants' further argument that compliance with the order might lead to the "loss of their plan's tax qualified status under Internal Revenue Code § 401(a)(13), 26 U.S.C. § 401(a)(13)," the Court said (*ibid.*):

"The Tax Division of the Justice Department, in view of the interest of the Internal Revenue Service on the issue, has submitted an *amicus curiae* brief for the Secretaries of Labor and the Treasury, both of whom are vested by Congress with responsibility for administering ERISA. The position enunciated therein is that an implied exception to ERISA's anti-alienation and assignment section does exist for the enforcement of family support obligations."

The answers given by the *Merry* Court do not apply to appellant's situation in the cases from which this appeal is taken. Insofar as the first answer is concerned, the orders and decrees directed at appellant are issued by state courts which, by express provision of ERISA, have no jurisdiction to instruct plan fiduciaries with regard to the performance of their fiduciary duties. Accordingly, appellant cannot safely act on the basis of those orders and decrees.

Insofar as the second answer is concerned, the Secretary of Labor argues in his *amicus curiae* brief on appeal in *Stone v. Stone* that "Section 514 of ERISA preempts California community property law insofar as it relates to or its application would affect the administration or

operation of employee benefit plans covered by the Act" and in support of that argument, concludes (BNA Pension Reporter No. 221, *supra*, p. R-12):

"Finally, the Secretary wishes to emphasize that the effect of the Court's decision will necessarily be felt far beyond the confines of this case, which involves a participant who is already in pay status under the plan. **State courts are vested with wide discretion in fashioning equitable remedies in divorce, and may, absent clear guidance as to scope of preemption, be drawn to exercise that discretion in such a way as to give a non-participant spouse rights which are more immediate, or less subject to contingency, than those of the participant.** For example, although it is permissible for a state court to compute the value of a participant's right or expectancy of a pension benefit in determining the size of the community property 'pot' to be divided, it would be intolerable under the ERISA scheme for a court to order the immediate payment of that value in order to fully effectuate a community property settlement. **Such orders would endanger the soundness and possibly the solvency of pension plans and threaten the financial well-being of all participants.**"

ERISA Interpretative Bulletin 78-1 issued by the Secretary of Labor in December 1978 (BNA Pension Reporter No. 219, p. R-14), while applicable in terms to vacation plans, reflects the position expressed in the *amicus curiae* brief on the *Stone* appeal. The Commissioner of Internal Revenue has indicated concurrence with the position of the Secretary of Labor through the broad and comprehensive terms of Section 1.401(a)(13) of the Income Tax Regulations (43 FR 6942, February 27, 1978) and through letter

rulings (cf. Ref. No. 7920005, February 14, 1979, BNA Pension Reporter No. 241, p. J-1).

It is apparent from the foregoing that enforcement of the provision of ERISA giving the federal courts exclusive jurisdiction over actions involving the responsibilities under ERISA of plan fiduciaries is essential to the accomplishment of the objectives of that Act, not only as they affect orders and decrees under the California community property laws but also as they affect the impact of state orders and decrees generally upon covered employee benefit plans. We submit, therefore, that the federal question as to whether state courts have jurisdiction to enter the orders affirmed or directed by the Court of Appeal in these cases is equally if not more substantial than the question as to whether or not the provisions of Title I of ERISA supersede the California community property laws and implementing statutes and court rules insofar as they relate to an employee pension benefit plan covered by that Act.

CONCLUSION

When Congress enacted the broad preemption provisions of Section 514 it recognized "the dimensions of such a policy" and established a Joint Pension Task Force "to make a full study and review of", among other matters, "the effects and desirability of the Federal preemption of State and Local law with respect to matters relating to pension and similar plans" (ERISA, Secs. 3021 and 3022(a)(4), 29 U.S.C. §§ 1221, 1222(a)(4); see *Hewlett-Packard Co. v. Barnes*, *supra*, 425 F. Supp. at p. 1300). Clearly, therefore, Congress did not intend that state courts should write

implied exceptions into the preemption provisions, based upon the perception of those courts as to what Congress should have excepted from the provisions. To condone such action is to disrupt the "national scheme" of ERISA and to destroy the "national uniformity" desired by Congress (compare *Hisquierdo v. Hisquierdo*, *supra*, 99 S.Ct. 809-810).

The interests and well-being of the persons whom Congress sought to protect, namely, the participants and beneficiaries of employee pension benefit plans covered by ERISA, require that this Court intervene at the earliest possible date to establish (1) that state courts may not write exceptions into the preemption provisions of Section 514 which are not expressed in that Section and (2) that state courts have no jurisdiction to order plan fiduciaries to make benefit payments in violation of the documents and instruments governing the plan. We submit, therefore, that the Court should note probable jurisdiction of this appeal and set the appeal down for plenary consideration.

Dated, San Francisco, California,

June 14, 1979

THOMAS E. STANTON, JR.

VICTOR J. VAN BOURG

Attorneys for Appellant

(Appendices Follow)

Appendices

APPENDIX A

CERTIFIED FOR PUBLICATION

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

<u>In re the Marriage of Christine and Fernando S. Campa.</u>		}	1 Civil 42946 (Sup. Ct. No. 322539)
Christine Campa,	Appellant,		
vs.			
Fernando S. Campa,	Respondent,	}	
Carpenters Pension Trust Fund for Northern California,	Respondent.		
<u>In re the Marriage of Joan Clare and James Patrick Durkin.</u>		}	1 Civil 42506 (Sup. Ct. No. 60586)
Joan Clare Durkin,	Respondent,		
vs.			
James Patrick Durkin,	Respondent,	}	
Carpenters Pension Trust Fund for Northern California,	Appellant.		
<u>Carolyn J. Bryant,</u>		}	1 Civil 43538 (Sup. Ct. No. 204325)
	Plaintiff and Respondent,		
vs.			
Carpenters Pension Trust Fund for Northern California,	Defendant and Appellant.		

[Filed Feb. 2, 1979]

These three cases present the question whether the Employee Retirement Income Security Act of 1974, 29 United States Code, section 1001 et seq. (hereafter ERISA) precludes California courts from joining pension funds in marriage dissolution proceedings and from ordering such funds to divide pension payments between the employee and his or her former spouse. We conclude that ERISA has no such effect for the reasons we discuss below.

As a preliminary question we also decide that a spouse may join the pension plan here involved without first submitting a claim to the plan.

I

A. In 1975 Christina Campa (hereafter Christine) petitioned for dissolution of her 21 year marriage. She and her husband entered into a written property settlement agreement. As part of the division of the community property the agreement provided that Christine would receive a specified portion of her husband's monthly retirement benefits from the Carpenters Pension Trust Fund for Northern California (hereafter Fund). Christine also waived spousal support. The Fund was not a party at this stage.

Christine obtained an interlocutory judgment of dissolution which incorporated the agreement and, shortly thereafter, a final judgment. The Fund at first assured Christine that it would pay her her portion of her ex-husband's benefits. The Fund changed its mind and notified Christine that it would make all pension payments directly to her husband. As a result Christine successfully moved for an order setting aside the portion of the judgment re-

lating to retirement pay and ordering the Fund to be joined as a party.

The Fund removed the action to the United States District Court (N.D. Cal.) on the basis of its preemption claim. The District Court remanded. It concluded that the action was "a simple domestic relations matter founded solely upon state law" and that the mere existence of a disputed issue of federal law did not give the court jurisdiction.

After remand the Fund answered. As defenses it pled lack of jurisdiction, failure of the joinder petition to state facts sufficient to constitute a cause of action and ERISA's preemption of "any and all State laws insofar as they may now or hereafter relate to" the Fund. Cross-motions for summary judgment ultimately followed. In its motion the Fund for the first time contended that Christine had not complied with provisions of the Trust Agreement and Pension Plan (hereafter Trust Agreement) which require that any claim for benefits be submitted to the trustees of the Fund.

The trial court denied Christine's summary judgment motion, and entered a judgment dismissing the Fund. Christine appeals. We reverse.

B. Joan Durkin (hereafter Joan) petitioned for dissolution of her ten year marriage in 1976. On her motion early in the proceedings the Fund was joined as a party. The Fund's answer avers that the court lacks subject matter jurisdiction, that Joan had not complied with the provisions of the Trust Agreement purporting to require her to file a claim with the trustee and that ERISA preempts applicable California law.

The Fund unsuccessfully sought a summary judgment. Ultimately the trial court entered an interlocutory judgment of dissolution. The judgment included a provision ordering the Fund to pay Joan a specified portion of her husband's pension when he received pension payments.

The Fund appeals from the interlocutory judgment. (Code Civ. Proc., § 904.1, subd. (j).) We affirm.

C. The third case comes to us not directly from a marriage dissolution proceeding but from a declaratory relief action that followed in its wake. Carolyn Bryant (hereafter Carolyn) brought that action against her former husband, William, and against the Fund. Carolyn alleged that she had been divorced from William in 1973 and that she and William owned a community property asset which the dissolution judgment had failed to divide, namely William's pension "in said" Fund. She sought a declaration that she owned a half-interest in the pension and an order requiring the Fund to show her ownership on its records.

Following abortive efforts by William and the Fund to remove the action to the United States District Court and to obtain a summary judgment in the state court, the case went to trial. The Fund's defenses were the same as in *Durkin*. The court found in favor of Carolyn, fixed her interest in accordance with a formula based on the pension credits acquired during the marriage and ordered the Fund to pay directly to Carolyn her share of the pension when William starts to receive it.

The Fund appeals from the judgment. We affirm.¹

¹William's appeal was dismissed earlier by this court pursuant to Rule 10(c) of the California Rules of Court.

II

The contention that the wives in the three cases first had to present their claims to the trustees of the Fund need not detain us long.

A. The issue may not properly be before us in *Campa*. The Fund first raised it in connection with the cross-motions for summary judgment, almost a year after the Fund had been made a party. The Fund did not plead it as a defense in its answer. Under those circumstances the defense may well have been waived. (Compare *Gunderson v. Superior Court* (1975) 46 Cal.App.3d 138, 143-145.) However, since the issue is clearly present in the other two cases, we shall decide it on its merits as to all three.

B. There is no doubt that the Trust Agreement sets forth the procedure which the Fund contends that the wives should have used.² It is, of course, familiar law that

²Article IX, section 2 of the Trust Agreement provides:

"No Employee, Retired Employee or other beneficiary or person shall have any right or claim to benefits under the Plan other than as specified in the Plan. Any and every claim to benefits from the Fund, and any claim or right asserted under the Plan or against the Fund, regardless of the basis asserted for the claim and regardless of when the act or omission upon which the claim is based occurred, shall be resolved by the Board of Trustees under and pursuant to the Plan and its decision with regard to the claim or right shall be final and binding upon all persons affected by the decision. The Board of Trustees shall establish a procedure for the presentation, consideration and determination of any such claim or right, which procedure shall comply with ERISA. No action may be brought for benefits under the Plan or to enforce any right or claim under the Plan or against the Fund until after the claim for benefits or other claim has been submitted to and determined by the Board in accordance with the procedure thus established and thereafter the only action which may be brought is one to enforce the decision of the Board or to clarify the rights of the claimant under such decision."

normally such internal remedies must be exhausted before resort to the courts will be allowed. (2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 177, p. 1041.) "Such internal remedies are designed not only to promote the settlement of grievances but also to promote more harmonious relationships, and the courts look with favor upon them." (*Holderby v. Internat. Union etc. Engrs.* (1955) 45 Cal.2d 843, 846.)

The principle requiring exhaustion of private administrative remedies has a number of exceptions. One of the better known of these covers situations where the decision of the administrative body is certain to be adverse. (*Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834; 2 Witkin, *op. cit. supra*, § 177, p. 1044.)

Application to the Fund by the wives would have been the essence of futility. Christine tried it informally with the noted results. The Fund's position throughout the litigation of these cases has been that it would not and could not divide the pension checks between the covered husbands and their ex-wives. Indeed, in December 1975 the Trust Agreement was amended to explicitly limit spouses of retired employees "to a community property share of the pension actually received by a Retired Employee, after such receipt. . . ." Under this provision, which antedates all proceedings against the Fund in the cases before us, the trustees of the Fund would have no alternative but to turn down the wives' claims.

Under these circumstances, we will not require the empty ritual of first going to the trustees of the Fund. Such a step would certainly not "promote the settlement of griev-

ances" or "more harmonious relationships" (*Holderby, supra*, at p. 846) or any other purpose of the exhaustion of remedies rule.

III

We turn to the main issue. As indicated earlier, we are required to decide whether ERISA precludes our courts from making pension plans parties to marriage dissolution proceedings and from ordering them to divide pension payments between the employee and his or her ex-spouse.³

Our inquiry is delineated by *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525:

"Our prior decisions have clearly laid out the path we must follow to answer this question. The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e.g.*, U.S. Const., Art. I, § 10; *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898), 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption provides assurance that 'the federal

³We reach the same conclusion as in *In re Marriage of Johnston* (1978) 85 Cal.App.3d 900, which was published after our opinion was prepared, and *Johns v. Retirement Fund Trust* (1978) 85 Cal. App.3d 511, which answers the question summarily.

In *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, the U.S. District Court also ruled against the preemption claim. Another judge of the same court reached the opposite result in an opinion not published as of the date of this writing. (*Francis v. United Technologies Corp.* (N.D. Cal. 1978) No. 77-1504 CFP.)

state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has 'unmistakably . . . ordained,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, *supra*, at 230."

Jones dealt with state regulation of commerce, but the same principles apply to determine the effect of a Congressional enactment on other state law. (E.g., *Malone v. White Motor Corp.* (1978) U.S., 98 S.Ct. 1185; *Wissner v. Wissner* (1950) 338 U.S. 655.) In determining whether Congress has "unmistakably ordained" preemption in the situation before us, we will examine ERISA, including its provision that subchapters I and III of the Act "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." (29 U.S.C. § 1144(a) (hereafter § 1144(a))).⁴ We will also

⁴Section 1144 in pertinent part provides:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

. . .

"(c) For purposes of this section:

"(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the

analyze the aspects of California law which the Fund contends are superseded in order to determine if they "relate to" employee benefit plans within the meaning of section 1144(a).

IV

ERISA is a pension reform law of major importance. Its objectives and principal provisions are not difficult to understand. The Act must be viewed in light of the abuses it was designed to correct. Private pension plans grew rapidly after the end of World War II. In many cases they were inadequate, mismanaged and promised benefits that proved to be illusory.⁵ A three-year Congressional study of the private pension system "clearly established that too many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized."⁶

District of Columbia shall be treated as a State law rather than a law of the United States.

"(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

"(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law."

⁵This background is set forth in the legislative history of the Act. (See, e.g., House Report No. 93-533, 1974 U.S. Code Cong. and Admin. News, p. 4639 et seq.)

⁶Statement by the Honorable Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, upon introducing the Conference Report on H.R. 2. (1974 U.S. Code Cong. and Admin. News, at p. 5177.)

To remedy this situation ERISA mandates major reforms:

—It limits the maximum length of time that an employee has to work before becoming a participant in a pension plan established by his employer.⁷ (29 U.S.C. § 1052.)

—It sets minimum “vesting” standards, giving employees nonforfeitable rights to a pension upon reaching retirement age, whether or not they leave their employment before that age. (29 U.S.C. § 1053.)

—It requires “that contributions are made to pension plans at a rate sufficient to provide reasonable assurance that adequate funds will be on hand to meet all vested benefit claims.” (U.S. Code Cong. & Admin. News, at p. 5177; see 29 U.S.C. § 1081 et seq.)

—It provides “an insurance system which will protect employees and their beneficiaries in their vested pension rights, despite premature plan termination.” (U.S. Code Cong. & Admin. News, at p. 5177; see 29 U.S.C. § 1301 et seq.)

—It imposes “strict fiduciary obligations upon those who exercise management or control over the assets or administration of an employee pension or welfare fund, as well as . . . reporting and disclosure requirements.” (U.S. Code Cong. & Admin. News, pp. 5177-5178; 29 U.S.C. § 1101 et seq.)

—It provides for administrative and judicial remedies. (29 U.S.C. § 1131 et seq.)

⁷For a concise summary of the principal ERISA provisions, see Williams’ statement, footnote 6, *supra*. See also, Comment, *The Employee Retirement Income Security Act of 1974: Policies and Problems* (1975) 26 Syr. L.Rev. 539.

—It makes tax changes, among them the creation of tax incentives for the establishment of individual retirement accounts. (U.S. Code Cong. & Admin. News, at p. 5178.)

Congress, in essence, aimed that pension rights are real—that new employees are not kept from participating in a plan for a long time and that expected benefits do not evaporate due to underfunding, maladministration, a company going out of business or a termination of employment after many years of work. The preemption claim and ERISA’s section 1144(a) must be viewed in this setting. By section 1144(a) Congress clearly wanted to protect the standards and safeguards which it had created against state interference. (*In re Marriage of Pardee* (C.D. Cal. 1976) 408 F.Supp. 666.)

The crucial question becomes whether the state laws involved in the cases before us constitute such interference—whether, in other words, they frustrate or contravene what Congress intended to do and did.

California treats pension rights, whether or not vested, as community property to the extent that they derive from employment during marriage. (*In re Marriage of Brown* (1976) 15 Cal.3d 838; *In re Marriage of Fithian* (1974) 10 Cal.3d 592; see also Reppy, *Community and Separate Interests in Pension and Social Security Benefits after Marriage of Brown and ERISA* (1978) 25 UCLA L.Rev. 417.) It does so out of a recognition of the economic importance of pension rights and the need to treat them equitably. (*In re Marriage of Brown, supra*.)

When a marriage terminates the community property is divided equally between the spouses, either by agreement

between them or, if they cannot agree, by the court. (Civ. Code, § 4800.) As far as pension rights are concerned this is often done by awarding them to the employee and compensating his or her spouse with other property of equal value. (*Phillipson v. Board of Administration* (1970) 3 Cal. 3d 32; *In re Marriage of Brown, supra*, 15 Cal.3d at p. 848.) When pension rights are handled in this manner, pension plans are unaffected: When the employee-spouse retires they pay the whole pension to him. But this approach is often not feasible when the pension rights are not vested because of the difficulty in ascertaining their value. It may also be impractical because of the absence of offsetting property. Or the parties themselves may prefer to have the nonemployee spouse share in the pension once it starts being paid in order to provide a measure of security in later years. In such cases the court can "award each spouse an appropriate portion of each pension payment as it is paid." (*In re Marriage of Brown, supra*, 15 Cal.3d at 848.)

In order to effectuate the division of the pension check, a pension plan may be made a party to a marriage dissolution proceeding and ordered to send two monthly checks instead of one. (*In re Marriage of Sommers* (1975) 53 Cal. App.3d 509.)⁸ The trial courts in *Durkin* and *Bryant* followed the above procedures; in *Campa* the court below declined to do so for the reason we have mentioned.

Thus, California law as applicable to the cases before us is concerned with effectuating a fair division of the monthly

⁸The *Sommers* procedure is statutory. (*Id.*, at p. 513.) The statutes were subsequently amended. (Stats. 1977, ch. 860.) We discuss the effect of the amendment in part V-F of this opinion below.

pension check between the former spouses. This concern plainly has no bearing on the effort of Congress, embodied in ERISA, to assure genuine pension rights. To ask a pension plan to send two monthly checks instead of one does not interfere with any of the Congressional objectives. It is, in fact, consonant with the objective of assuring that the members of the family receive the pension which they anticipated. We cannot find in ERISA or its extensive legislative history an unmistakable ordaining or "clear and manifest purpose" to prevent states from achieving this simple and sensible aim in their domestic relations proceedings. (*Jones v. Rath Packing Co., supra*; *Ray v. Atlantic Richfield Co.* (1978) U.S., 98 S.Ct. 988, 994; *Stone v. Stone, supra*.)

Our conclusion is reinforced by several factors. First, as we have indicated, control over how state courts dispose family assets in a divorce is wholly unnecessary in achieving the objectives of ERISA. Secondly, "[d]omestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts." (*Buechold v. Ortiz* (9th Cir. 1968) 401 F.2d 371, 373.) We will not lightly infer that Congress intended the "radical disturbance" (*Stone v. Stone, supra*, 450 F.Supp. at p. 932) of "the federal-state balance" (*Jones v. Rath Packing Co., supra*) which would result from ousting state regulation of community property in the situations before us. One federal court has observed that the consequence would be "legalized chaos" in which "the federal judiciary will have been granted a roving commission to delineate family property law with little assistance from the Con-

gress as to how to proceed." (*In re Marriage of Pardee, supra*, 408 F.Supp. at p. 669.)

Third, the California procedure accomplishes important objectives that do not conflict with Congress': The family assets are fairly divided, the divorce proceedings are conclusively resolved with respect to the pension and both spouses ultimately share in the pension. The integrity of pension funds remains unaffected. They do not pay out one cent more than their plans call for.

The Fund urges that ERISA seeks to reward employees for long service, to further the interest of employers in a stable work force, to insure financial security for retired employees and to provide security for the retired worker's surviving spouse. The argument that such objectives are contravened by California's treatment of pension benefits in marriage dissolutions is clearly without merit and has been repeatedly rejected. (*In re Marriage of Hisquierdo* (1977) 19 Cal.3d 613; *In re Marriage of Fithian, supra*.)

V

It remains for us to address several specific contentions made by the Fund.

A. The Fund points to ERISA's restrictions on assignment or alienation of pension benefits (29 U.S.C. §§ 206(d)(1), 1056(d)(1)) as evidence of Congress' concern that the pension benefits be preserved intact until an employee reaches retirement age. But dividing the benefits, once they are received, between an employee and his former spouse in no way clashes with this objective. It merely assures that the ex-wife partakes of the pension to the

extent that it was earned as a result of the community effort. (See *In re Marriage of Brown, supra*, 15 Cal.3d at pp. 851-852.) Her rights are those of an owner not a creditor. (*Phillipson v. Board of Administration, supra*, 3 Cal.3d at p. 44.)

The same argument was made and rejected in *Stone v. Stone, supra*. We agree with what the court said there (405 F.Supp. at p. 926):

"The payment of benefits to a nonemployee spouse in satisfaction of her community property claim does not conflict with the purposes of § 206(d)(1). Members of the families of employees are included in the class which ERISA protects. The basic purpose of ERISA is to protect the literally millions of people who depend on benefits from private pension plans for financial independence after retirement. H.Rep.No. 93-533, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 4639, 4640-4641; S.Rep.No. 93-127, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 4838, 4839-4840. Congress was concerned not only about the workers themselves whose employment entitles them to benefits. Congress was also concerned about the families of those workers who depend to the same degree on the actual availability of those benefits. It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce. Construing § 206(d)(1) to prevent a nonemployee spouse from enforcing marital property obligations against an employee benefit plan covered by ERISA would frustrate rather than further the policies of that provision."

B. The fund also places great stress on *Hewlett-Packard Co. v. Barnes* (N.D. Cal. 1977) 425 F.Supp. 1294, *affd.* (9th Cir. 1978) 571 F.2d 502. There, the court held ERISA preempts a state statute which regulated employee health benefit plans in detail. The plans involved in *Hewlett-Packard* were concededly subject to regulation under ERISA. Thus, the case involved competing regulatory schemes. The irrelevance of *Hewlett-Packard* to the question before us is highlighted by the fact that its author also wrote *Stone v. Stone, supra*, which reached the same conclusion as we do on the precise issue here involved.

C. The Fund contends that Congress was aware of community property laws when it enacted ERISA and intended to supersede them. To bolster this contention the Fund points to tax sections of ERISA which indeed provide that they should be applied without regard to community property laws. (26 U.S.C. §§ 219, 402(e), 408.)⁹ The argument proves too much. The fact that Congress chose to supersede community property laws *selectively* gives rise to a strong inference that Congress did not intend to preempt them *generally*.

D. The Fund next maintains that section 1144 of ERISA affirms the principle that provisions of collective bargaining agreements negotiated under the aegis of the

⁹Section 219(c)(2) providing for income tax deductions states that the deduction "shall be applied [separately] without regard to any community property laws." Section 408, which provides for the establishment of individual retirement accounts states in subsection (g) that "This section shall be applied without regard to any community property laws." Section 402(e) relating to the taxation of lump sum distributions from retirement plans provides that certain paragraphs of that section "shall be applied without regard to community property laws." (§ 402(e)(4)(G).)

National Labor Relations Act generally supersede conflicting state law. (E.g., *Teamsters Union v. Oliver* (1959) 358 U.S. 283.) The pension plan here purports to prohibit the nonemployee spouse from obtaining any order or other process against the Fund. This provision, the Fund urges, must prevail over contrary California law.

This argument is untenable in light of *Malone v. White Motor Co., supra*, U.S., 98 S.Ct. 1185. There the court held that the Minnesota Private Benefit Protection Act was not preempted by the National Labor Relations Act. The court noted that " 'We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the states.' *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289, 91 S.Ct. 1909, 1919, 29 L.Ed.2d 473 (1971)" (..... U.S. at, 98 S.Ct. at p. 1190.) The court went on to say (*ibid.*): "There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the Pension Act is preempted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here. . . ." (Emphasis in original.)

An implication that Congress in the NLRA intended to abrogate community property and domestic relations laws which divide pensions between ex-spouses is even less warranted than the one unsuccessfully urged in *Malone*.

E. The Fund also contends that ERISA expressly requires it not to consent to being joined as a party to marriage dissolution proceedings and not to honor a state court order requiring benefit payments to divorced spouses. This contention is based on 29 United States Code section 1104(a) which provides, in the part relied on by the Fund: "(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—[¶] (A) for the exclusive purpose of: [¶] (i) providing benefits to participants and their beneficiaries, and [¶] (ii) defraying reasonable expenses of administering the plan; . . . [¶] (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter."

"The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 526.)

Section 1104 is the basic fiduciary section of ERISA. In enacting it Congress was concerned over the course of con-

duct in pension fund transactions, the degree of responsibility required of fiduciaries, the types of persons who should be deemed fiduciaries and standards of accountability for them. (See, e.g., 1974 U.S. Code Cong. & Admin. News, pp. 4847, 4645, 5075 et seq.) Adherence to fiduciary standards is essential to the proper administration of a pension plan. Dividing pension benefits, once they are being paid out, between the former spouses, has no bearing on the honest and skillful administration of a pension plan.

Wissner v. Wissner, *supra*, 338 U.S. 655, relied on by the Fund, does not aid its position. *Wissner* dealt with a section of the National Service Life Insurance Act of 1940 which gave the insured under a serviceman's policy the right to designate the beneficiary. The court held that California could not frustrate this right by ordering half the proceeds of the policy to be paid to the serviceman's widow. Thus, *Wissner* involved a head-on clash between a specific enactment of Congress and state law. As the *Wissner* court noted, "the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress." (338 U.S. at p. 659.) Here, as we have seen, there is no clash and no frustration.

F. The Fund urges that legislation enacted in California in 1977 demonstrates that California community property laws "relate to" pension plans within the meaning of section 1144(a), regulate them and conflict with ERISA. The legislation referred to is Statutes 1977, chapter 860.

We note that this legislation, which went into effect on January 1, 1978, is not involved in any of the cases before us. The actions of the trial courts occurred before its

operative date. But since the Fund claims that the statute sheds light on how our community property laws affect pension plans, we will consider the point. It is wholly without merit.

Chapter 860 amends two sections of and adds two sections to our statutes dealing with termination of marriage:

(1) It amends Civil Code section 4351 to provide that an order or judgment in a dissolution proceeding can only be enforced against a pension plan if the plan has been joined as a party.¹⁰

(2) It amends Civil Code section 4363 to provide that a pension plan can be made a party only in accord with section 4363.1.¹¹

(3) New Civil Code section 4363.1 sets out the joinder procedure.¹² It gives the pension plan 45 days to respond—

¹⁰Civil Code section 4351 now provides (portion added by 1977 amendment is emphasized):

"In proceedings under this part, the superior court has jurisdiction to inquire into and render such judgments and make such orders as are appropriate concerning the status of the marriage, the custody and support of minor children of the marriage, the support of either party, the settlement of the property rights of the parties and the award of attorneys' fees and costs; *provided, however, no such order or judgment shall be enforceable against an employee pension benefit plan unless the plan has been joined as a party to the proceeding.*"

¹¹Civil Code section 4363 now provides (new material emphasized):

"The court may order that a person who claims an interest in a proceeding under this part be joined as a party to the proceeding in accordance with rules adopted by the Judicial Council pursuant to Section 4001; *however, an employee pension benefit plan shall be joined as a party to a proceeding under this part only in accordance with the provisions of Section 4363.1.*"

¹²Civil Code section 4363.1 provides:

"(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court. A copy of the

a longer period than the norm (see Code Civ. Proc., § 412.20, subd. (a)(3); Cal. Rules of Court, rule 1254(b))—and frees it from paying all filing fees.

(4) New Civil Code section 4363.2 gives a pension plan which elects to be governed by it an option not to appear at any hearing in the dissolution action and a right, even if it does not appear, to move to set aside or modify any court order aimed at the plan within thirty days.¹³

joinder request together with a copy of a summons and a blank copy of a notice of appearance both in form and content approved by the Judicial Council shall be served upon the employee pension benefit plan in the same manner as service of papers in civil actions generally. Service of the summons upon a trustee or administrator of the employee pension benefit plan in his capacity as such, or upon any agent designated by the plan for service of process in his capacity as such, shall constitute service upon the employee pension benefit plan.

"(b) A notice of appearance shall be filed and served by the employee pension benefit plan upon the party requesting joinder within 45 days of the date of the service upon the employee pension benefit plan of a copy of the joinder request and summons. The employee pension benefit plan shall indicate in the notice of appearance whether it consents to be governed by the provisions of Section 4363.2. If it fails to do so, the plan shall be deemed not to have consented. Notwithstanding any contrary provision of law, the employee pension benefit plan shall not be required to pay any fee to the clerk of the court as a condition to filing such notice of appearance or any subsequent paper in the proceeding.

"(c) If the employee pension benefit plan has been served and no notice of appearance, notice of motion to quash service of summons pursuant to Section 418.10 of the Code of Civil Procedure, or notice of the filing of a petition for writ of mandate as provided in such section, has been filed with the clerk of the court within the time specified in the summons or such further time as may be allowed, the clerk, upon written application of the party requesting joinder, shall enter the default of the employee pension benefit plan in accordance with Chapter 2 (commencing with Section 585) of Title 8 of Part 2 of the Code of Civil Procedure."

¹³Civil Code section 4363.2 provides:

"(a) An employee pension benefit plan which elects to be governed by the provisions of this section shall not be required to, but may, appear at any hearing in any proceeding under this

It is immediately apparent that chapter 860 continues the joinder practice used in two of the cases before us and

part to which the plan has been joined as a party. For purposes of the Code of Civil Procedure, such plan shall be considered a party appearing at trial with respect to any hearing at which the interest in the plan of the parties is an issue before the court. Those provisions of any order entered in the proceeding which affect a plan electing to be governed by the provisions of this section, or which affect any interest either the petitioner or respondent may have or claim under such plan, shall not become effective until 30 days after the order has been served upon the employee pension benefit plan; provided, however, that the plan may agree in writing to waive all or any portion of the 30-day period. If within the 30-day period, the plan files in the proceeding a motion to set aside or modify those provisions of the order affecting it, such provisions shall not become effective until the court has resolved the motion.

“(b) At any hearing on a motion to set aside or modify an order pursuant to subdivision (a), any party may present further evidence on any issue relating to the rights of the parties under the employee pension benefit plan or the extent of the parties’ community or quasi-community property interest in the plan. Any findings of fact or conclusions of law made by the court with respect to the order which is the subject of the motion shall take account of such evidence.

“(c) The grounds upon which the provisions of an order affecting an employee pension benefit plan or the interest of the petitioner and respondent therein shall be set aside or modified shall include, but shall not be limited to, the following:

“(1) Neither petitioner nor respondent has any interest, whether vested or unvested, in the employee pension benefit plan.

“(2) The order grants greater or different rights to the non-employee spouse, the employee spouse, or the nonemployee spouse and employee spouse combined, than the employee spouse has under the terms of the employee pension benefit plan.

“(3) The order requires payment to the nonemployee spouse of a benefit which under the terms of the plan is only payable on account of or after the death of the employee spouse to a person specified by the terms of the employee pension benefit plan and not selected by the employee spouse.

“(4) The order requires the employee pension benefit plan to make payments in discharge of the nonemployee spouse’s interest in the plan after the nonemployee spouse’s death.

“(5) The order awards to the nonemployee spouse any of the separate property portion or more than 50 percent of the community and quasi-community property portion of the employee’s interest under the employee pension benefit plan.”

recognized by *In re Marriage of Sommers, supra*. *Sommers* was based on California statutory law as it then existed. (53 Cal.App.3d at p. 513.) What chapter 860 evinces is added concern for the practical needs of the pension plans: They cannot be subjected to orders dividing a pension unless they are joined, they are given a longer time to appear than ordinary litigants, they are freed from payment of filing fees and they are given a special option not to appear at all but nevertheless to retain the right to object to the court’s order.¹⁴ But the important point is that chapter 860 does not basically change California practice; it changes only details and those in ways favorable to pension plans.

The Fund nevertheless asserts that compliance with California law is burdensome to it. The Fund claims that in a two-year period it has been joined in 21 marital dissolution proceedings. The Fund has 37,000 participants.¹⁵ The Fund does not tell us whether all of these cases resulted in orders against it.¹⁶ Assuming they did, the Fund would ultimately have to mail two monthly checks instead of one in these cases and do the related record keeping. Recognizing that the total number of cases in which the Fund has to do that is likely to increase over the years, the task is,

¹⁴The Fund argues that its fiduciary obligations prevent it from taking advantage of this section. We doubt it: Normally the Fund would have no interest in how the trial court divides the pension rights between the spouses. Be that as it may, the new legislation certainly imposes no added burdens on the Fund.

¹⁵The number 21 is taken from the Fund’s briefs. At oral argument the Fund’s counsel stated that the number of such cases was 55.

¹⁶We noted earlier that upon termination of the marriage, the pension rights are often awarded to the employee-spouse and compensating assets given to the other spouse.

nevertheless, hardly overwhelming. As to appearing in marriage dissolution proceedings, we have seen that chapter 860 does not make the Fund's participation in them more onerous and in most of these proceedings there will be little, if any, need for the Fund to participate actively. The Fund does not contend that the cost of compliance threatens its fiscal integrity; on oral argument the Fund conceded that the cost does not make its compliance with California law economically unfeasible.

VI

Our analysis necessitates the conclusion that in enacting ERISA Congress did not intend to preclude the states from dividing pension rights in marital dissolution proceedings in the manner in which this is done by California courts. Accordingly, we dispose of the cases before us as follows:

A. *In re Marriage of Campa*

The trial court denied Christine's motion for summary judgment and granted the Fund's motion. The denial is not appealable but may be reviewed on Christine's appeal from the judgment against her. (*Aas v. Avemco Ins. Co.* (1976) 55 Cal.App.3d 312, 323; Code Civ. Proc., § 906.) We have concluded that the Fund has presented no meritorious defense to being made a party. The record reveals no factual disputes between the Fund and Christine. She is, therefore, entitled to summary judgment.

Accordingly, the judgment is reversed with directions to the trial court to enter judgment in favor of Christine and against the Fund.

B. *In re Marriage of Durkin*

The judgment is affirmed.

C. *Bryant v. Carpenters Pension Trust Fund*

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

Brunn, J.*

We Concur:

Caldecott, P.J.

Rattigan, J.

*Assigned by the Chairperson of the Judicial Council.

**In the Court of Appeal
of the
State of California**

First Appellate District

Division Four

In re the Marriage of Christine and Fernando S. Campa	No. 42946
In re the Marriage of Joan Clare and James Patrick Durkin	No. 42506
Carolyn J. Bryant, Plaintiff and Respondent, vs. Carpenters Pension Trust Fund for Northern California, Defendant and Appellant.	No. 43538

[Filed Mar. 1, 1979]

BY THE COURT:

The typewritten opinion filed herein on January 31, 1979, is modified by striking lines 17, 18 and 19 from page 15 and inserting in their place: marriage dissolutions has been rejected by our Supreme Court. (See *In re Marriage of Fithian, supra*, 10 Cal.3d 592 at pp. 597-604.)

The Court further renders the following opinion in denying the petition for rehearing:

In its petition for rehearing the Fund contends that our opinion conflicts with the decision recently rendered

by the United States Supreme Court in *Hisquierdo v. Hisquierdo* (1979) U.S. (47 U.S.L. Week 4141). The *Hisquierdo* court reviewed a California marital-dissolution judgment in which the community property law of this State had been applied as the basis for awarding the wife an interest in future pension benefits to be paid the husband under the Railroad Retirement Act. (45 U.S.C.A. § 231 et seq.) The court held that California's community property laws could not support the award because they conflicted with pertinent provisions of the Railroad Retirement Act, which had therefore preempted them by operation of the Supremacy Clause. (U.S. Const., art. VI, cl. 2; *Hisquierdo, supra*, at p. [47 U.S.L. Week at p. 4146.]) In a footnote however, the court expressly distinguished ERISA and established that the decision did not reach it. (*Hisquierdo, supra*, at p. [47 U.S.L. Week at p. 4146, fn. 24.]) *Hisquierdo* therefore does not affect the present case.

The petition for rehearing is denied.

Dated MAR 1 1979

Caldecott P.J.

APPENDIX B

Minutes, California Supreme Court

San Francisco, Apr. 12, 1979

(1 Civ. 42946) (1 Civ. 42506) (1 Civ. 43538) Div. 4—
In Re Marriage of Campa, Appellant, v. Campa, Respond-
ent (89 Cal.App.3d 113); And Companion Cases. Petition
of Carpenters Pension Trust Fund for Northern California
for hearing denied.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES INVOLVED

1. Article VI, Clause 2, of the United States Constitution provides:

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002, provides in pertinent part:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

3. Section 206(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056(a), provides as follows:

(a) Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which—

(1) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations, prescribed by the Secretary of the Treasury.

4. Section 206(d)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056(d)(1) provides:

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

5. Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1102(a)(1) provides:

(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

6. Section 409(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1109(a), provides:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall per-

sonally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

7. Section 502 of the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1132, provides:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator)

by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employer benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty

against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(c)(1) of such Code.

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

8. Section 503 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1133, provides:

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under

the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

9. Section 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144, provides:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes

of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a state.

(c) For purposes of this section:

(1) The term "State Law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulations issued under any such law.

10. Section 1021 (c) of the Employee Retirement Income Security Act of 1974 provides:

Act Sec. 1021. (c) Retirement Benefits May Not Be Assigned or Alienated. Section 401(a) is amended by inserting after paragraph (12) the following new paragraph:

"(13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 1975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on the date of the enactment of the Employee Retirement Income Security Act of 1974."

11. Section 3021 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1221, provides:

The staffs of the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives, the Joint Committee on Internal Revenue Taxation, and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate shall carry out the duties assigned under this title to the Joint Pension Task Force. By agreement among the chairmen of such Committees, the Joint Pension Task Force shall be furnished with office space, clerical personnel and such supplies and equipment as may be necessary for the Joint Pension Task Force to carry out its duties under this title.

12. Section 3022(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1222(a), provides:

Act Sec. 3022. (a) The Joint Pension Task Force shall, within 24 months after the date of enactment of this Act, make a full study and review of—

(1) the effect of the requirements of section 411 of the Internal Revenue Code of 1954 and of section 203 of this Act to determine the extent of discrimination, if any, among employees in various age groups resulting from the application of such requirements;

(2) means of providing for the portability of pension rights among different pension plans;

(3) the appropriate treatment under title IV of this Act (relating to termination insurance) of plans established and maintained by small employers;

(4) the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans; and

(5) such other matter as any of the committees referred to in section 3021 may refer to it.

13. California Civil Code Section 4351 provides:

In proceedings under this part, the superior court has jurisdiction to inquire into and render such judgments and make such orders as are appropriate concerning the status of the marriage, the custody and support of minor children of the marriage, the support of either party, the settlement of the property rights of the parties and the award of attorney's fees and costs; provided, however, no such order or judgment shall be enforceable against an employee pen-

sion benefit plan unless the plan has been joined as a party to the proceeding.

14. California Civil Code Section 4359 provides:

During the pendency of any proceeding under Title 2 (commencing with Section 4400) or Title 3 (commencing with Section 4500) of this part, upon application of either party in the manner provided by Section 527 of the Code of Civil Procedure, the superior court may issue ex parte orders (1) restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life, and if such order is directed against a party, requiring him to notify the other party of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures; (2) enjoining any party from molesting or disturbing the peace of the other party or any person under the care, custody, or control of the other party; (3) excluding either party from the family dwelling or from the dwelling of the other upon a showing that physical or emotional harm would otherwise result, as provided in Section 5102; and (4) determining the temporary custody of any minor children of the marriage.

15. California Civil Code Section 4363 provides:

The court may order that a person who claims an interest in a proceeding under this part be joined as a party to the proceeding in accordance with rules adopted by the Judicial Council pursuant to Section 4001; however, an employee pension benefit plan shall be joined as a party

to a proceeding under this part only in accordance with the provisions of Section 4363.1.

16. California Civil Code Section 4363.1 provides:

(a) Upon written application by a party to a proceeding under this part, the clerk shall enter an order joining as a party to the proceeding any employee pension benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court. Upon entry of the order, the party requesting joinder shall file an appropriate pleading setting forth the party's claim against the plan and the nature of the relief sought. A copy of such pleading, a copy of the joinder request, a copy of the summons and a blank copy of a notice of appearance in form and content approved by the Judicial Council shall be served upon the employee pension benefit plan in the same manner as service of papers generally. Service of the summons upon a trustee or administrator of the employee pension benefit plan in his capacity as such, or upon any agent designated by the plan for service of process in his capacity as such, shall constitute service upon the employee pension benefit plan. To facilitate service, the employee spouse shall furnish within 30 days after written request the name, title and address of the plan's trustee, administrator, or agent for service of process, to the nonemployee spouse. If necessary, the employee shall obtain the information from the plan.

(b) A notice of appearance shall be filed and served by the employee pension benefit plan upon the party requesting joinder within 30 days of the date of the service upon the employee pension benefit plan of a copy of the joinder

request and summons. Notwithstanding any contrary provision of law, the employee pension benefit plan shall not be required to pay any fee to the clerk of the court as a condition to filing such notice of appearance or any subsequent paper in the proceeding.

(c) If the employee pension benefit plan has been served and no notice of appearance, notice of motion to quash service of summons pursuant to Section 418.10 of the Code of Civil Procedure, or notice of the filing of a petition for writ of mandate as provided in such section, has been filed with the clerk of the court within the time specified in the summons or such further time as may be allowed, the clerk, upon written application of the party requesting joinder, shall enter the default of the employee pension benefit plan in accordance with Chapter 2 (commencing with Section 585) of Title 8 of Part 2 of the Code of Civil Procedure.

17. California Civil Code Section 4363.2 provides:

(a) The provisions of this section shall govern any proceeding in which an employee pension benefit plan has been joined as a party. To the extent not in conflict with this section and except as otherwise provided by rules adopted by the Judicial Council pursuant to Section 4001, all provisions of law applicable to civil actions generally shall apply regardless of nomenclature to the portion of such proceeding as to which the plan has been joined as a party if they would otherwise apply to such proceeding without reference to this section.

(b) The employee pension benefit plan may, but need not, file an appropriate responsive pleading with its notice of

appearance. If it does not, then all statements of fact and requests for relief contained in any pleading served on the plan shall be deemed controverted by the plan's notice of appearance.

(c) Either party or their representatives may notify the plan of any proposed property settlement as it concerns the plan prior to the interlocutory hearing. If so notified, the plan may stipulate to the proposed settlement or advise the representative that it will contest the proposed settlement.

(d) The employee pension benefit plan shall not be required to, but may, appear at any hearing in the proceeding. For purposes of the Code of Civil Procedure, the plan shall be considered a party appearing at the trial with respect to any hearing at which the interest of the parties in the plan is an issue before the court. Those provisions of any order entered at or as a result of a hearing not attended by the plan (whether or not the plan received notice of the hearing) which affect the plan or which affect any interest either the petitioner or respondent may have or claim under the plan, shall not become effective until 30 days after the order has been served upon the employee pension benefit plan; provided, however, that the plan may waive all or any portion of the 30-day period. If within the 30-day period, the plan files in the proceeding a motion to set aside or modify those provisions of the order affecting it, such provisions shall not become effective until the court has resolved the motion.

If the provisions of the order affecting the plan are modified or set aside, the court, on motion by either party, may

set aside or modify other provisions of the order related to or affected by the provisions affecting the employee pension benefit plan.

(e) At any hearing on a motion to set aside or modify an order pursuant to subdivision (d), any party may present further evidence on any issue relating to the rights of the parties under the employee pension benefit plan or the extent of the parties' community or quasi-community property interest in the plan. Any findings of fact or conclusions of law made by the court with respect to the order which is the subject of the motion shall take account of such evidence.

18. California Civil Code Section 4370 provides:

(a) During the pendency of any proceeding under this part, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding relating thereto. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter augment or modify any award so made. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding.

(b) During the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court:

(1) At the time of the hearing of the cause on the merits; or

(2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

19. California Civil Code Section 4380 provides:

Any judgment, order, or decree of the court made or entered pursuant to this part may be enforced by the court by execution, the appointment of a receiver, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary.

20. California Civil Code Section 5105 provides:

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

21. California Civil Code Section 5110 provides:

Except as provided in Section 5107, 5108, and 5109 and subdivision (c) of Section 5122, all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant

to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired prior to January 1, 1975, by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if so acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. When a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single-family residence is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from

and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

22. California Civil Code Section 5125 provides:

(a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

23. Rule 1252(a) of the California Rules of Court provides:

(a) The petitioner or the respondent may apply to the court for an order joining a person as a party to the proceeding who has or claims custody or physical control of any of the minor children of the marriage or visitation rights with respect to such children or who has in his possession or control or claims to own any property subject to the jurisdiction of the court in the proceeding.

24. Rule 1253(a) of the California Rules of Court provides:

(a) An employee pension benefit plan shall be joined as provided in Civil Code section 4363.1 and rule 1256. All other applications for joinder shall be made by serving and filing a notice of motion that specifies a hearing date not more than 20 days from the date of filing the notice. The application shall state with particularity the claimant's interest in the proceeding and the relief sought by the applicant, and it shall be accompanied by an appropriate pleading setting forth such claim as if it were asserted in a separate action or proceeding.

25. Rule 1255 of the California Rules of Court provides:

Except as otherwise provided in this chapter or by the court in which the proceeding is pending, the law applicable to civil actions generally shall govern all pleadings, motions, and other matters pertaining to that portion of the proceeding as to which a claimant has been joined as a party to the proceeding in the same manner as if a separate action or proceeding not subject to these rules had been filed.

26. Rule 1256 of the California Rules of Court provides:

Every request for joinder of employee pension benefit plan and order and every pleading on joinder shall be in the form prescribed by rules 1291.15 and 291.35. Every summons issued thereon shall be in the form prescribed by rule 1291.40. Every notice of appearance of employee pension benefit plan and responsive pleading filed pursuant to Civil Code section 4363.2(b) shall be in the form prescribed by rule 1291.25.

APPENDIX D

SECTION 6 OF ARTICLE II OF CARPENTERS PENSION FUND AGREEMENT DATED AUGUST 19, 1958, AS AMENDED BY AMENDMENT NO. 12 THERE TO EXECUTED AS OF DECEMBER 22, 1975

(1975 amendments are shown in italics)

Section 6. Each Employee, Retired Employee or beneficiary under the Pension Plan is hereby restrained from selling, transferring, anticipating, assigning, *alienating*, hypothecating or otherwise disposing of his pension, prospective pension or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, *alienation*, hypothecation or other disposition. Any such pension, prospective pension, right or interest shall not be subject in any manner to voluntary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants, and from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings to the fullest extent permissible by law. *The rights of a spouse of any Employee or Retired Employee shall be limited to a community property share of the pension actually received by a Retired Employee, after such receipt, and to rights as the designated beneficiary of an Employee or Retired Employee or other rights specifically provided in the Pension Plan, and no pension, prospective pension, right or interest of an Employee or Retired Employee shall be subject to any order, decree, execution or other legal or equitable process or proceeding for the benefit of such spouse directed to the Fund.*

APPENDIX E

**In the United States District Court
For the Northern District of California**

Civil No. 76-1424 GBH

In re the Marriage of
Petitioner: Christine Campa

and

Respondents: Fernando S. Campa
and
Carpenters Pension
Trust Fund

[Filed Sep. 1, 1976]

ORDER GRANTING PETITION FOR REMAND

This action grows out of a dissolution proceeding between the Campas which was initiated in California state court pursuant to California Civil Code § 4506(1). When Christine Campa joined Carpenters Pension Trust Fund as a party under applicable California law, the Trust Fund removed the matter to this court.

Petitioner Christine Campa has now moved to remand the action to state court on the ground that, contrary to the allegations of the Petition for Removal, there is in fact no federal question jurisdiction in this court and hence no basis for removal under 28 U.S.C. § 1441.

Respondents Fernando S. Campa and the Trust Fund argue that this matter is properly in federal court because

the federal status of the Trust Fund is in issue and because state court orders respecting the distribution of funds from, and the duties of the trustees of, the Trust Fund is inconsistent with the paramount federal policy expressed in the Employee Retirement Income Security Act of 1974.

Twenty-eight U.S.C. § 1441(b) provides in pertinent part that:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. * * *

Removal jurisdiction, then, is keyed to original jurisdiction, as § 1441(b) tracks the language of 28 U.S.C. § 1331, the federal question statute. It is clear, however, that this court would not have original jurisdiction over the instant matter, and therefore the removal to this court was improvident.

For original jurisdiction to exist in a federal question case, the matter in controversy must "arise under" federal law. Although this phrase is inexact and has been subject to varying interpretations, it is settled that the federal question must be an essential element appearing on the face of the complaint. *Gully v. First Nat. Bank*, 299 U.S. 109, 112-113 (1936); *Smith v. Grimm*, 534 F.2d 1346, 1350 (9th Cir. 1976). The federal question may not be inferred from a defense or anticipated defense. *Smith v. Grimm*, *supra*; 1A Moore's Federal Practice Para. 0.160 at 183-184, 192.

Here, Christine Campa's claim arises solely from state law and is not dependent in any manner on federal law; indeed, her action could not be maintained in the first instance in federal court. The only federal ingredient in this action enters collaterally as a defense by the Trust Fund. The mere existence of a disputed issue of federal law does not confer federal question jurisdiction, *McCorkle v. First Pennsylvania Banking and Trust Co.*, 459 F.2d 243, 250 (4th Cir. 1972), nor does the existence of a federal statute which poses a formal impediment to recognition of a plaintiff's claim grounded in state law. *Gully v. First Nat. Bank*, *supra* at 116; *Smith v. Grimm*, *supra* at 1351.

Respondents contend that the federal legislation cited herein has preempted the field, but such preemption raises no more than a defense to the state court claim and does not provide a basis for removal. *State of Washington v. American League of Prof. Base. Clubs*, 460 F.2d 654, 660 (9th Cir. 1972); *State of N.Y. v. L. 1115 J. Bd. N.H. & H.E.D.*, 412 F.Supp. 720, 723-724 (E.D. N.Y. 1976)

No matter how respondents seek to characterize this matter, it remains at bottom a simple domestic relations matter founded solely upon state law. It is a commonplace that federal courts do not sit to handle domestic relations cases, *Blank v. Blank*, 320 F.Supp. 1389, 1390 (W.D. Pa. 1971), and that divorce actions engender no federal question. *Milligan v. Milligan*, 484 F.2d 446, 447 (8th Cir. 1973); *Estilette v. Estilette*, 402 F.Supp. 1078, 1079 (W.D. La. 1975). So deeply ingrained are these principles that in *Bates v. Buskey*, 407 F.Supp. 163, 164 (D. Me.

1976), a diversity paternity action, the district court judge declined jurisdiction on the "domestic relations exception," even though the case was technically and concededly within the court's jurisdiction.

If there were any doubt on the matter, it was dispelled in the recent case of *In re Marriage of Pardee*, 408 F.Supp. 666 (C.D. Cal. 1976). In *Pardee*, the district court judge faced a fact situation on all fours with the instant one, except that the objecting Pension Trust Fund was that of the Operating Engineers. The judge concluded that the wife's action against the Fund was not separate from her community property claim against her husband, and that,

Removals such as these constitute an intolerable interference with traditional state functions. *Id.* at 669.

The *Pardee* case follows the line and weight of authority discussed hereinabove, and this court can see no reason why a different result should obtain here.

Accordingly, petitioner's motion to remand is hereby granted. It is so ordered.

Dated: Sep 1 - 1976

George B. Harris
United States District Judge

**In the United States District Court
For the Northern District of California**

Civil No. 76-1875 GBH

Carolyn J. Bryant,	} Plaintiff,
vs.	
William J. Bryant, et al.,	
	Defendants.

[Filed Jan. 17, 1977]

ORDER GRANTING PETITION FOR REMAND

This matter grows out of a dissolution proceeding commenced in a California state court. Plaintiff and defendant Bryant, formerly husband and wife, were granted a dissolution in San Mateo County Superior Court, and some of their community property was divided by the court. Plaintiff claims, however, that an additional item of community property, namely a pension in the Carpenters Pension Trust Fund for Northern California, was inadvertently not disposed of. Accordingly, plaintiff filed a second action for declaratory relief that she is the owner of a one-half interest in said pension as a tenant in common and to quiet title thereto. She also joined the Carpenters Pension Trust Fund as a defendant.

Defendant Carpenters Pension Trust Fund removed the matter to this court, and plaintiff has now moved to remand.

Plaintiff relies heavily on the recent decision of this court in *Campa v. Campa*, C-No. 76-1424 (N.D. Cal. 1976). In *Campa*, this court ordered a remand where the Carpenters Pension Trust Fund had removed a state court dissolution proceeding in which it was named as a party and in which a portion of a pension under the Fund was claimed as a community asset.

Carpenters Pension Trust Fund seeks to distinguish the instant case by the fact that here the dissolution is a fact accomplished, while in *Campa* the dissolution proceeding was still pending. This attempted distinction is not persuasive, for the pension at issue here bears the same relationship to the parties and the state court action as did the pension in *Campa*. That the plaintiff herein identified the subject pension in her state court complaint as one existing under the Employee Retirement Income Security Act of 1974 does not distinguish this case from *Campa*, nor does it make the instant action "arise under" federal law within the contemplation of 28 U.S.C. § 1441(b).

Defendant Carpenters Pension Trust Fund cites *Rehmar v. Smith*, 79 L.C. Para. 11,718 (9th Cir. 1976) in support of its position, but that case did not involve a dissolution, did not grow out of state law and did involve a claim for money from the pension fund.

Accordingly, plaintiff's motion to remand is hereby granted. It is so ordered.

Dated: Jan 17 1977

George B. Harris
United States District Judge

APPENDIX F

Superior Court of California

County of Alameda

Case No. 517017-5

<p>In re the Marriage of Petitioner: Helen Martin Edmond and Respondent: Rufus Simon Edmond Claimant: Carpenters Pension Trust Fund for Northern California</p>
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[Filed May 23, 1979]

STIPULATION AND ORDER

The Petitioner and Claimant in the above-entitled proceeding stipulate as follows:

1. Claimant contests the jurisdiction and right of the above-entitled Court to entertain joinder proceedings against Claimant and to enter any order directing Claimant to pay any pension benefits to any person, or in any way, other than is provided in the Pension Plan administered by Claimant, and the right of any party to such proceedings to pursue such joinder proceedings or to claim or receive any such payments.

2. The issues raised by Claimant's objections are before the United States Supreme Court in several proceedings pending before said Court and the parties desire to avoid duplicative litigation and appeals.

3. Without waiving any of its objections, including objections to jurisdiction, Claimant agrees that the above-entitled Court may reserve jurisdiction in an interlocutory judgment and final judgment herein with respect to the issues of benefits, if any, to be paid by Claimant to Petitioner or Respondent herein, or to both, and the manner of payment of such benefits.

4. All objections by Claimant including objections to jurisdiction, are reserved until such time as the issues specified in paragraph 3 are tried.

5. The Claimant hereby agrees and stipulates that this matter, except as to said issues, may proceed and waives notice of trial herein.

Dated: May 9, 1979

Van Bourg, Allen, Weinberg &
Roger
Johnson & Stanton

By /s/ Thomas E. Stanton, Jr.

Thomas E. Stanton, Jr.
Attorneys for Claimant

/s/ R. Eugene Vernon

R. Eugene Vernon
Attorney for Petitioner

ORDER

Pursuant to the foregoing stipulation and good cause appearing therefor,

IT IS HEREBY ORDERED as follows:

1. That the Court shall reserve jurisdiction in an interlocutory judgment and final judgment herein with respect to the issues of benefits, if any, to be paid by Claimant to petitioner or respondent herein, or to both, and the manner of payment of such benefits.

2. That all objections by Claimant, including objections to jurisdiction, shall be reserved until such time as the above issues are tried.

3. Pursuant to the above Stipulation, this matter may proceed except as to the above reserved issues.

Dated: May 23 1979

Jacqueline Taber
Judge of the Superior Court

APPENDIX G

1 Civil Nos. 42946, 42506 and 43538

**In the Court of Appeal
of the
State of California**

First Appellate District

Division Four

In re the Marriage of Christine and Fernando S. Campa	No. 42946
In re the Marriage of Joan Clare and James Patrick Durkin	No. 42506
Carolyn J. Bryant, Plaintiff and Respondent, vs. Carpenters Pension Trust Fund for Northern California, Defendant and Appellant.	No. 43538

[Filed June 8, 1979]

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that the Carpenters Pension Trust Fund for Northern California, the Respondent in 1 Civil No. 42946 and the Appellant in 1 Civil Nos. 42506 and 43538, hereby appeals to the Supreme Court of the United States from the judgment of the Court of Appeal, First Appellate District, of the State of California entered in this action

on February 2, 1979. Said judgment, which reversed the judgment of the Honorable O. Vincent Bruno, Judge of the Superior Court of the State of California for the County of Santa Clara in 1 Civil No. 42946 with directions that judgment be entered in favor of Christine Campa and against the Appellant and affirmed the judgment of the Honorable Gilbert B. Perry, Judge of the Superior Court of the State of California for the County of Santa Cruz in 1 Civil No. 42506 and the judgment of the Honorable Gerald E. Ragan, Judge of the Superior Court of the State of California for the County of San Mateo in 1 Civil No. 43538, became final on April 12, 1979, when the California Supreme Court denied appellant's petition for a hearing.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).
Dated: June 6, 1979

Van Bourg, Allen, Weinberg & Roger
Victor J. Van Bourg
Johnson & Stanton
Thomas E. Stanton, Jr.

By /s/ Thomas E. Stanton, Jr.
Thomas E. Stanton, Jr.
Attorneys for Appellant

CERTIFICATE OF SERVICE

Thomas E. Stanton, Jr., whose business address is 221 Sansome, San Francisco, California, certifies that he is a member of the Bar of the Supreme Court of the United States and he is one of the counsel representing the appellant in the within entitled matter; that on June 6, 1979, he served a copy of the foregoing Notice of Appeal on all parties to the proceedings in the Court where the judgment appealed from was issued, by depositing such copy in a sealed envelope in a United States post office or mail box, with first-class postage prepaid, addressed to Counsel of Record for each such party, or to the party personally, as follows:

Mark H. Lipton, Esq., Sims, Lipton & D'Anna, 84 W. Santa Clara Street, Suite 660, San Jose, CA 95133, as counsel of record for Christine Campa in 1 Civil No. 42946.

Fernando S. Campa, 1670 Guadalupe Avenue, San Jose, CA 95125, as party respondent in 1 Civil No. 42946.

Nicholas P. Barthel, Esq., Wyckoff & Miller, 113 Cooper Street, Santa Cruz, CA 95061, and Harold W. Martin, Esq., 135 North San Mateo Drive, San Mateo, CA 94401, as counsel of record for the parties in 1 Civil No. 42506.

Schapiro and Thorn, Inc., Suzie S. Thorn, 110 Sutter Street, San Francisco, CA 94104, and David P. Weaver, Esq., Alcoa Building, Suite 1313, One Maritime Plaza, San Francisco, CA 94111, as counsel of record for the parties in 1 Civil No. 43538.

Dated: June 6, 1979

/s/ Thomas E. Stanton, Jr.
Thomas E. Stanton, Jr.